93-822

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

BANCO COOPERATIVO DE PUERTO RICO,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it proper, ethical and legal for a government agency (Federal Savings & Loan Insurance Corporation, and its successor, Federal Deposit Insurance Corporation) to avail themselves of questionable tactics to gain priority in an attachment, and the federal court system assist them, let them get away with it, and validate their actions?

2. Is the Puerto Rico Civil Code Article 1824(4)(b) which gives preference to judgment credits among themselves according to the priority of their dates, to be totally disregarded by the posterior levying of an attachment, no matter the ways used to get it?

LIST OF PARTIES TO THE PROCEEDING

Petitioner:

Banco Cooperativo de Puerto Rico

Respondents:

Prudential Bache Securities, Inc.

Federal Deposit Insurance Corporation

Miguel Serrano Arreche*

Municipality of Ponce*

Shearson-American Express*

United States Solicitor General**

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* Miguel Serrano Arreche, Municipality of Ponce and Shearson-American Express were in the original case but did not intervene in any of the incidents having to do with this dispute in the District Court nor in the Court of Appeals. Federal Deposit Insurance Corporation substituted the Federal Savings & Loan Insurance Corporation.

** Included per Rule 29.4 of the Rules of the Supreme Court.

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No.

In The

Supreme Court of the United States

October Term, 1993

BANCO COOPERATIVO DE PUERTO RICO,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Banco Cooperativo de Puerto Rico, hereby respectfully petitions for a writ of certiorari to be issued to the United States Court of Appeals for the First Circuit, so that this Court may review their decision affirming and awarding preference to an attachment made by the respondent. Banco had a prior judgment and *a prior attachment order* which it could not execute because respondent improperly instigated judicial proceedings before the federal District Court to prevent Banco Cooperativo from executing the same. Even though the court stated that "nobody is waiving any right" when preventing Banco's attachment, and had ruled its previous order void, that

same court later issued another attachment order on behalf of the Federal Deposit Insurance Corporation (hereinafter "FDIC") and turned the monies over to them. In so doing, a specific statute of the Puerto Rico Civil Code was ignored.

OPINIONS BELOW

The United States District Court for the District of Puerto Rico decided for FDIC by Opinion and Order dated March 6, and filed March 11, 1992, in case No.84-758, captioned *FSLIC v. Shearson-American Express, Inc.* (Appendix, *infra,* 28a). Jurisdiction was based on 28 U.S.C. § 345.

The United States Court of Appeals for the First Circuit affirmed said judgment by Opinion dated June 24, 1993 (3a). The Order denying the request for rehearing was issued on August 27, 1993. (1a).

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was issued by the Court of Appeals for the First Circuit on June 24,1993. A timely Petition for Rehearing and suggestion that the case be heard *en banc* was filed on July 21, 1993, and petition and suggestion were denied by Order dated August 27, 1993. (1a).

The discretionary jurisdiction of this Honorable Court is invoked under the authority of the Act of March 3, 1891, c. 517, 26 Stat. 826, § 6; Act of February 13, 1925, 43 Stat. 936, 938-9; Judicial Code, 28 U.S.C.A. §§ 1254(1) and 2101(c) and Rule 13.1 of the Rules of the Supreme Court. Section 2101(c), *supra,* allows ninety days after the entry of judgment to apply for the writ.

STATUTES INVOLVED

Puerto Rico Civil Code Chapter 399, 31 LPRA § 5191 to § 5195, Articles 1821 to 1825 (48a), about Credit Preference provides *"for their graduation and payment in the order and manner specified in this chapter."* Articles 1822 to 1825 establish the order of classification for *all* credits. Article 1824 states that "(w)ith regard to all other personal property of the debtor [excluding the ones covered in Articles 1822 to 1823] preference *shall be given* to:

> 4. Indebtedness which without a special privilege appear:
>
> (a) In a public instrument.
>
> (b) *In a final judgment,* should they have been the object of litigation.
>
> *These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments.*

STATEMENT OF THE CASE

Banco Cooperativo de Puerto Rico sued Miguel Serrano Arreche and since December 1986 tried to attach certain shares of Serrano, but was prevented by the Federal Savings & Loan Insurance Corporation (later FDIC) and the federal District Court from doing it. Banco was threatened with contempt proceedings; the District Court took custody of the shares, forbade any attachment on the shares, and stated that everybody's rights were preserved. Banco believed the court's assurance, filed the attachment papers in the case and waited.

Two years later the court decided that FDIC's opposition to the attachment was baseless but by that time Serrano was under the protection of the Bankruptcy Court, Banco was still without a remedy. The delay afforded by the federal court was enough time for FDIC to get their own judgment against Serrano, on October 16,1989 – over two years later than Banco's September 15, 1987 judgment.

On May 16, 1990 the Bankruptcy Court in open court announced the dismissal in 20 days of Serrano's petition, granting creditors 11 days from notice of the order "to express their positions as to the disposal of the funds" (the shares had been sold). That same day the FDIC attorneys did two things: first, agreed with the attorneys for the other creditors to meet two days later – the 18th – to discuss the distribution of the funds to be released, as per the court's suggestion and, second, went to another federal district judge and applied for a Writ of Attachment.

The next day, May 17, FDIC hushedly served the Writ of Attachment on the Bankruptcy Court clerk. Next day, at the start of the meeting, the attorney for the FDIC announced that the funds had been already attached, making the meeting moot. The funds were turned over to the District Court and despite the opposition of Banco and Bache, eventually turned over to the FDIC.

The court, based on FDIC's prior attachment, awarded the funds to them. Banco claimed from the beginning – contrary to the Circuit Court's conclusion [*see* 42a and our footnote No. 7], that FDIC acted in bad faith in impeding Banco from attaching first. The District Court, perhaps unwittingly, aided FDIC in its scheme and, more important, gave false assurances to Banco that its rights were preserved, as "nobody was waiving anything". Later, the court's ruling makes Banco "waive everything". Banco also claims that by virtue of Article 1824(4)(b) of the Civil Code, Banco's judgment should have preference, independently of the attachment.

REASONS FOR GRANTING THE WRIT

Regarding the first Question Presented, on February 12, 1987 Banco obtained an attachment order against Serrano in a local suit; three years three months later, on May 17, 1990, FDIC also obtained an attachment order against said Serrano. The FDIC and the District Court prevented Banco from executing the attachment, and granted the monies to FDIC, *because they attached first.* (3a, 28a).

If Banco's attachment order was issued almost three years before the FDIC got his, why was FDIC's attachment done prior to Banco's? Was Banco marked by neglect? Not so. What happened was that even before FDIC got its judgment, in early 1987, FDIC threatened Banco with contempt of court proceedings and successfully moved the federal District Court to order Banco to abstain from attaching the property now under litigation. (Docket No. 501, Vol. I, pp. 66 to 70, Exhs. 1 to 4). FDIC succeeded in having the court assume custody of the property, which at the time consisted of some 32,000 shares. The shares were placed under the custody of the court clerk "for safekeeping" and the judge stated he did not want anyone (Banco nor Bache) attaching the property, *assuring Bache and Banco that their rights would be preserved by the Court.* "Nobody waives nothing", was his statement at the time. (Docket No. 502, Vol. I, Exhs. I, J, K, L, M., pp. 120 to 134). Banco's big mistake was believing said assurance. It was not true!

What was the basis for FDIC's action at that time, if they did not have a judgment? Their mistaken notion that the property that Banco was trying to attach was subject to a restitution order issued against Serrano in an unrelated criminal case. They argued that Banco's proposed attachment was a violation of the restitution order. (Docket No. 502, Exh. H, p. 116). The court, although apparently not going along totally with that argument – otherwise the shares would have been seized – ordered the shares deposited "under the custody" of the court clerk, and prohibited Banco from attaching them. (Docket No. 502, Exhs. L, M, pp. 124, 125). That

was round one, and with a couple of daring moves (a contempt motion based on an inapplicable restitution order and a court's order and promise that nobody waives nothing), FDIC was granted the round.

In an effort to preserve its rights, Banco filed a motion on September 9, 1987, – still two years prior to FIDC's judgment and three years prior to their attachment – wherein Banco's attachment order was made a part of the case file. The motion stated:

> (s)aid attachment has not been executed out of comity from the insular court and Banco Cooperativo since this Honorable Court – Judge Pieras, Jr. – decided that the stock would be kept by the court's clerk and that no attachment would ensue. As a matter of record and as evidence of the interest of Banco Cooperativo to attach either the shares or the proceeds if they are released by the Court, copies of the attachment papers are hereby included with the request that they be made part of the record.

(Docket No. 501, Vol. I, Exh. 4, pp.67-68).

Attorneys for FDIC replied that the reason the attachment was not executed was not comity, as "any attempt by Banco Cooperativo to attach the shares would have been in violation of the July 24, 1985 Order Appointing Trustee entered in Cr. 84-381 (JP)". (Docket No. 506, Vol. I, par. 5, pp.246-247). That was a mere repetition of the "low blows" of round one, and they took round two, also.

And they were probably right. More than comity it was fear of the threat of contempt proceedings they had used against Banco. But, the fear they instilled then and over which they gloated in their

motion should be duly noted by this Court. The fact remains that they impeded Banco from executing a valid attachment order, with the aid of the court, without any legal basis for their actions, in what could be termed an abuse of legal proceedings.

On September 1987, Serrano applied for bankruptcy and the criminal file and the shares were transferred to the Bankruptcy Court, where they were converted into cash. Much later – March 23, 1989 – the District Court determined that the contempt motion was not well taken, as the restitution order invoked by FDIC, and under which custody of the shares was taken, did not apply to the shares. (Docket No. 502, Vol. I, Exh. O, p. 157). It is a shame that this statement was not made before Serrano applied for bankruptcy, when Banco could attach the shares. But Banco was not as lucky in the federal District Court as FDIC was. Anyway, as the proceeds from the sale were by then under the custody of the Bankruptcy Court due to Serrano's bankruptcy petition, Banco was still barred by law, for a second time, from attaching them. Third round goes to FDIC.

Now, how FDIC managed to squeeze in its attachment in order to gain priority over Banco, is another chapter. The Bankruptcy Court judge announced in open court on Wednesday May 16, 1990, near noon, that Serrano's Chapter 11 petition was going to be dismissed and requested that within the next 11 days the parties advise her as to the disposition of the funds. (Docket No. 502, Vol. I, Exh. I, p. 186). Attorneys for the main creditors (FDIC, Prudential Bache, Puerto Rico Treasury Department, Banco Cooperativo, Serrano's attorney and possibly others)[1] met in the

1. The attorney for FDIC, with a very straight face, agreed on the meeting around noon. But the same day (May 16) at 4:02 p.m. he had already prepared and filed a four page motion requesting an attachment, duly sworn, an attachment order project, designated a process server and early next day had secured the order and executed the attachment. Thus, FDIC was ready for the meeting of the 18th.

halls of the court building right after the May 16 hearing and agreed to hold a meeting in the law offices of one of them on the 18th, to discuss the disbursal and possible distribution of the funds in an equitable manner among all the creditors. The agreed meeting was confirmed by telecopier on May 17, to all parties. (Docket No. 502, Vol. I, Exh. V, pp. 191-192).

Come May 18 and in said meeting an attorney for FDIC announced that they had secured an attachment order the day before (the 17th) and had served the papers on the Bankruptcy Court clerk, thereby the meeting was superfluous. (Docket No. 491-2-4, Vol. I, pp. 23-32). It is not unreasonable to conclude that the stealthiness of their action was their previous knowledge of Banco's judgment and attachment which they had prevented before and wanted again to prevent from being executed. If it is morally and ethically wrong it can not be legally right. You cannot use the legal system to spring traps. And they did in this case more than three times.

Acting under the attachment order the funds were transferred to the clerk of the federal District Court and shortly afterwards FDIC requested that the funds be disbursed to them. By this time they must have had an inkling that Banco was probably interested in the funds and could have something to say about the requested disbursement, but they did not notify Banco of their motion. Bache was not notified either. Neither was any disclosure made to the judge issuing the attachment order of what had transpired. And that is the story of how FDIC attached first.

Rule 10.1 of the Rules of the Supreme Court states that a review on a writ of certiorari is not a matter of right, but of judicial discretion. Under subsection (a) it is suggested that the writ might be issued when a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, *or sanctioned such a departure by a lower court,* as to

call for an exercise of this Court's power of supervision". We consider the actions of FDIC deplorable; the approval of said course of action by our district and appeals court lamentable and disheartening. We should expect more from attorneys, parties and the courts in our judicial system in their true essence as guardians of what is fair, true, moral and legal.

Did the FDIC act in good faith? Is what the FDIC did and the court approved, "the accepted and usual course of judicial proceedings"? The ethical, straightforward way lawyers should litigate in our courts? Especially government agencies? Is the way this situation has been handled by the lower courts (ignored) a role model of what the system allows? Is winning all?

Black"s Law Dictionary says what every self-respecting professional knows, defining good and bad faith, thus:

> *Good faith* is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, . . . the *absence of design to defraud or to seek an unconscionable advantage;* honesty of intention, and *freedom from knowledge of circumstances which ought to put the holder upon inquiry.* An honest intention to *abstain from taking any unconscientious advantage of another, even through technicalities of law,* together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. [At 623].
>
> *Bad faith* [implies] a design to mislead or deceive another; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively

> operating with furtive design or ill will. [At 127].

Why did FDIC fiercely oppose Banco's legitimate efforts to attach the funds of Serrano, threatening Banco and Bache with contempt proceedings? Why did they want the court to take custody of the property, when at the time they did not have a judgment against Serrano? Why did they agree on a meeting of all the attorneys representing Banco, Bache, the local Treasury Department, and other creditors? Why did they wait until their appearance at the meeting to say that they had procured and served an attachment order? Why was the attachment procured so furtively? Why wasn't the judge who issued their attachment order advised that there had been a previous attachment order issued? Was he told that the federal court had prevented said attachment; did somebody tell him that it was the FDIC who moved the court to prevent said attachment; was he alerted by the FDIC that said attachment was made a part of the file where the monies were deposited? Was there an obligation to make a full disclosure of the facts surrounding the remedy that was being requested? Somebody must answer these rhetorical questions. The inquiry is open. The only way to get the answers is by issuing the writ requested. And let somebody do some very good explaining.[2]

The second Question Presented concerns the Puerto Rico Civil Code (52a). Article 1824(4)(b) states that if holders of two final judgments are trying to collect from the same debtor, the older

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2. All of the facts set out in this brief were averred by Banco in the memoranda and documents filed at the District Court. The lower court, in deciding without a hearing, (saving FDIC the embarassment of an explanation) stated it was ruling "based exclusively on the memoranda and documents filed by the three interested parties". It means our factual averments were taken as true. If such were not the case, we suggest the case be remanded for an evidentiary hearing.

judgment shall have priority over the later. The statute is that simple. In this case Banco Cooperativo and the FDIC had two final judgments and both were trying to collect from the same funds. Banco has the oldest judgment – September 15, 1987; FDIC the newest – October 16, 1989. Consequently, Banco should have preference over FDIC to collect his credit. Yet, the lower courts ruled otherwise.[3]

The Puerto Rico Civil Code clearly states that preference among judgment creditors shall be determined exclusively by the dates of the judgments. The Code devotes Chapter 399, 31 LPRA §§ 5191 to 5195, Articles 1821 to 1825 (48a-52a) to Credit Preference,[4] providing *"for their graduation and payment in the order and manner specified in this chapter."* Article 1821.

Articles 1822 to 1825 establish the order of classification for *all* credits. Article 1824 states that "(w)ith regard to all other personal property of the debtor [excluding the ones covered in Articles 1822 to 1823] preference *shall be given* to:

> . . . 4. Indebtedness which without a special privilege appear:
>
> (a) In a public instrument.
>
> (b) *In a final judgment,* should they have been the object of litigation.

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3. The lower courts misnamed Banco's claim as "of a lien". Such is not the case. Banco claims "preference", which is what the statute clearly grants.

4. Copy of Chapter 399 of the Civil Code, 1930 ed., on Classification of Credits (Official Translation) is included. (48a-52a). Said sections are equivalent to Articles 1821 to 1825 of the Civil Code. Cases prior to 1930 refer to our 1902 edition of the Code, Articles 1822 to 1826, with the same text. In the Spanish Civil Code they are numbered from 1921 to 1925, with the exact same text.

> *These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments.*

If the Article means what it says, the credits of FDIC and Banco "*shall* have preference among themselves according to the priority of dates . . . of the judgments", *i.e.*, the earliest over the latest, *i.e.*, Banco's over FIDC's, and not the other way around.

The simplicity of the article leaves little room for interpretation. This is our substantive law and has been interpreted repeatedly by our local Supreme Court, our federal District Court and *all* Civil Code commentators in the only obvious sensible way that it can be interpreted. It should be added that attachments are only procedural measures, under our system.

As the lower courts based their decisions on a supposedly prior attachment and its reading of a dictum of a local case dating from 1916, which we claim is wholly inapplicable to the factual situation of this case (during the three quarters of a century since the *dictum* it has never been quoted on the subject but once, and that to explain it away) we must take a look at the cases quoted.

Both lower courts cite the cases of *Oronoz & Co. v. Alvarez*, 23 P.R.R. 497 (1916) (Wolf, J.); *P. R. Bedding Mfg. Corp. v. Herger*, 91 P.R.R. 503, 507 (1964); and *Empresas Capote, Inc. v. Tribunal Sup.* 3 P.R. Sup. Ct., Official Translations 1067, 1078-79 (1975), and based their decisions – against the grain of the law – mainly on their interpretation of the *Oronoz* case. That interpretation is flawed in several aspects, mostly in not realizing what a *common creditor* is under our Classification of Credits' system. Let's see the case in some detail.

Oronoz & Co., and Alvarez were both *common creditors* of Santiago. Oronoz & Co. sued Santiago and attached certain goods

Of course, the corporation did not have a judgment at the time. Alvarez also sued Santiago in an independent action, and attached and sold the goods which Oronoz & Co., had attached. A Mr. Oronoz, from Oronoz & Co., was the depository of the attached goods and he relinquished the goods to the marshals attaching for Alvarez. When Alvarez obtained his judgment, he collected his credit from the proceeds.

When Oronoz & Co. realized it had nowhere to collect its judgment from the debtor Santiago, they sued Alvarez. The lower court decided for Alvarez, and the Supreme Court (Wolf, J.), affirmed the judgment, basing his decision on the fact that Oronoz & Co. had abandoned the attachment when their depository (Oronoz) relinquished the goods they had attached.

The *ratio decidendi* of the case is that if you place an attachment over certain goods and you relinquish the goods, the attachment is gone, caput, finished, and you cannot entertain an action against the second "attacher" to recover from him what you should have recovered from the attached goods (unless you had a lien over the property).

The part quoted by the lower court in its Opinion is *obiter dicta*. This is obvious from reading the case. Justice Wolf himself sums up the allegations of the appellants thus:

> The appellants would have us infer that they had a valid subsisting *lien* and that hence the subsequent attachment and sale thereunder were made subject to that *lien*.

As when Oronoz finally got his judgment the property had been already *sold* and Alvarez paid, as he had no lien, he could not go after the property. He was out of luck and without a remedy.

Not only is the opinion quoted *dicta* but it is also inapplicable to this case. Furthermore, it is conceptually wrong; an equivocal exposition of the law. And confuses the terms "lien" and "preference". We copy the part quoted by the lower court:

> We have recently decided that the mere priority in judgment gives the prior creditor no *lien. Auffant v. Succession of Manuel de J. Ramos et al.*, [23 P.R.R. 385 (1916)]. An attachment or other similar step is necessary to give the judgment a priority and as between judgment creditors the first to attach has the priority. It is a race of diligence. The priority of payments to which sections 1822 *et seq.* of the Civil Code relate has no application to attachments.

The first sentence ("mere priority in judgment gives the prior creditor no lien) is absolutely true and nobody can argue with it.[5] But if one is quoting that sentence and extrapolating it to "mere priority in judgment gives the prior creditor no preference" then one runs into a problem with § 1824 of the Civil Code – that has nothing to do with liens – and says directly the opposite; mere priority in judgment gives the prior judgment creditor preference. Oronoz & Co., precisely was claiming some sort of *lien* (p. 498 of the decision) by virtue of his prior attachment over the goods that had already been sold and disbursed to Alvarez, and his request was rightfully denied. We see that the differentiation between "lien" and "preference" is crucial.

But both lower courts incorrectly characterized Banco's claim

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5. The case of *Auffant, supra,* has to do with a real lien created by an attachment made via registration in the Property Registry. Its inapplicability is obvious to anybody slightly aware of our Registry system. Apparently Justice Wolf (a Columbia University graduate from Washington, D. C. [*see* 57 P.R.R. XXXV] – with all due respect – was not.

as of a *lien*. Once our claim is characterized as a lien-claim, which it is not, the denial of the claim follows. However, the claim of preference should stand. And, the preference of a judgment granted by Article 1824 does not need the prerequisite of an attachment. The law itself does not require it and it can not be "legislated" by the courts.

The decision of the Appeals Court, with its "silence argument" of page 26 (24a) denotes confusion of the Code symmetry. The Chapter goes from the specific to the general. And, on the unspecified "all other personal and real property of the debtor", of course there can be no lien. But, that does not mean "no preference". Nor does it means that the only way to enforce the preference is by attachment or that an attachment defeats the preference. There is no law to that effect in the whole Civil Code. The procedure of choice to enforce the preference is the "terceria" if you do it timely, before the property is disposed of, while still under custody of the court, as it was in this case.

The assertion that the priority in judgment creates no *lien* cannot be extended to mean that for a judgment to have priority, an attachment "or other similar step" is necessary. The statement is incorrect as it seems to equate priority with attachments, brushing aside the whole Chapter 399.

The *Oronoz* case went on to state, in what is an obvious *obiter dictum*, and an incorrect expression of the law, that ". . . between judgment creditors the first to attach has the priority." What the court meant to say was that between *common* – not judgment – creditors the first to attach has the priority. Common creditors are Article 1825 creditors. Please bear in mind that is what the court was deciding; out of two *common* creditors, Oronoz & Co., and Alvarez, Oronoz & Co., had priority as it attached first, but lost it when it voluntarily relinquished the attached goods to Alvarez, who attached second, sold the goods and collected.

It is in this limited context (among common creditors the first to attach prevails) that the *Oronoz* case is quoted again in *Velez et al. v. Rosello Hermanos et al.*, 26 P.R.R. 192. And the second time it was ever mentioned is in *Heirs of Garriga v. O'Meara & Co.*, 28 P.R.R. 332 (1920). There the court merely said that *Oronoz* is inapplicable where the case "refers to the preference of claims by virtue of certain statutory rights", just as in the present case, as it was limited to "*the question . . . regarding the preference of rights derived from certain attachments levied . . .*"

Both lower courts cite *P.R. Bedding, supra,* to the effect that "(t)here is no question that among *common creditors* the first one who attaches has preference over the others . . ." But they failed to notice the legal connotation of the word "common" as the type of creditor to which the case refers, or failed to note that Banco *is not* a common creditor. And the rest of the paragraph was ignored.

Once one reads the whole paragraph one realizes that the *Bedding* case does not favor FDIC at all. After the Supreme Court pointed out that, like in this case, the *preference* claimed by the attaching plaintiff flows just from the attachment itself, the court added:

> Thus, we have held that the mere levy of an attachment at the instance of a COMMON CREDITOR is *not sufficient to place the attached property beyond the operation of Art. #1822 of the Civil Code,* under which preference, in connection with certain property of the debtor, is given to creditors for the purchase price of the attached property. *Gonzalez v. Alonso,* 33 P.R.R. 66 (1924).

It should be noted that, as in the *Bedding* case, the preference claimed by the FDIC "flows from the attachment itself." Also, that such "preference" in itself does not defeat the application of

Articles having to do with preference, such as Articles 1822 *et seq.* That is the holding in the *Bedding* case. As to dispel any further doubt, the court added:

> The provisions of the Civil Code on concurrence and preference of credits . . . are the source to which resort must be had . . . See *Heirs of Garriga v. O'Meara & Co.*, 28 P.R.R. 332 (1920).

It follows that if "the mere levy of an attachment" – which is what FDIC did – "by a common creditor" – which is what FDIC claims – "is not sufficient to place the attached property beyond the operation of Article #1822", just the same, it will not place the attached property beyond the operation of Articles 1823, and 1824, when applicable.

We are saying that FDIC claims FDIC and Banco are "common creditors" (which they are not) because that is the only way they can claim preference by virtue of the attachment, or can claim the applicability of *Oronoz*. As neither is a common creditor, but both are Article 1824(4)(b) creditors, the attachment can not determine preference. The preference is granted – as per the law – by Article 1824(4)(b). And as FDIC was stopped before it converted the funds, the preference holds.

Please note that *Bedding* had the prior attachment. It won the race against Sealy. Did it also win the case? No. Even though Sealy *did not have* an attachment and did not even try to get one, it prevailed with its statutory preference.

Our Supreme Court did not explain in the *Oronoz* case what appeared to be a statement that went against the application of Article 1824, at least not during the same court term. But they did four (4) years later, in the case of *Heirs of Garriga v. O'Meara*, 28 P.R.R. 332 (1920),.

In that case O'Meara had a judgment against a debtor and he made an attachment. Heirs had a credit against the same debtor for which they claimed preference based on Article 1823 (now 1822). But they did not have an attachment. So, O'Meara had the prior attachment. He won the race. Did he also win the case? Was *prior tempore portior jure* applied? No. Was *Oronoz* applied? No. Even though Heirs had no attachment, the court ruled for them based on the preference of their credit granted by Chapter 399. Most important, they explained the *Oronoz* case, thus:

> The case of *Oronoz & Co. v. Alvarez,* 23 P.R.R. 497, is not applicable. *There the question was regarding the preference of rights derived from certain attachments levied,* while the present case refers to the preference of claims by virtue of certain *statutory rights.*

Where did the court find those statutory rights? In our Chapter 399, which – said the court – contains rules of law of general application to cases "like the present . . . in which a controversy has arisen between two citizens regarding preference in the collection of their claims out of certain properties of a common debtor."[6]

The other case mentioned in the Opinion on this matter, is the *Empresas Capote* case, *supra*. It is cited as saying that, based on the axiom "*prior tempore portior jure*" among *common* creditors, the first who attaches has a preference over the others. Of course, said axiom applies when *common creditors* are concerned.

And if the case is examined, one will find that *Empresas,* holder of the "*prior tempore*" attachment (from 1969, and the

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6. It should be noted that Judge Wolf was still a member of the court.

other creditors from 1971) did not end with the "*portior jure*" but with *peior jure*. Why was that so? Because, like Banco, the 1971 creditor was not a common one, but a preferred creditor by virtue of the contract and Article 1489 of our Civil Code. And the complete quote adds that the preference of the first who attaches does not go beyond the right which the debtor – or others, we add – may have over the property attached, be it via lien or via preference. That's what the *Empresas Capote* case decided.

We must realize that Latin maxims may carry weight only if there is not a statutory right involved.[7] And, the classification of judgment creditors "according to the priority of dates of the . . . judgments" is just a codification of the maxim "*prior tempore potior iure*". But in this situation – between judgment creditors – we do not have to apply the maxim, but just the statutory rights created by the Code.

To solve the *raison d'etre* of the apparent confusion of FDIC, and the lower courts, we must look to that final, short, apparently innocuous Article 1825. It reads:

> *Credits of any other kind or for any other consideration not included in the preceding sections, shall have no preference.*

This article defines the *common creditor* to which *Oronoz, Bedding, Capote,* and other cases having to do with classification and preference of credits refer. He (the common creditor) is the one who, having no preference over any of the properties of the debtor

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7. Maxims are but attempted general statements of a rule or a truth. The written law prevails over maxims. Puerto Rico Civil Code states that: (a) a law (Article 1824, *i. e.*) can only be repealed by the legislature, and (b) when the text of the law is clear and free of ambiguity it should be followed. Articles 5 and 14, 31 P.R.L.A. §§ 5 and 14.

nor over any other credit against said debtor, has to run and attach whatever he can, for him to be able to collect from the debtor. His preference will only extend over *other common creditors* with no attachment whatsoever (*Bedding*), or with subsequent attachments (*Empresas*), unless the prior attacher, if there is one, relinquishes his attachment (*Oronoz*).

One last, but most important case. *Rodriguez v. Solivellas & Co.*, 49 P.R.R. 618 (1936) is one where our Supreme Court had to decide – applying Article 1824(4)(a) – whether a prior attachment had priority over the preference said section grants to an indebtedness in a public instrument. This is a similar situation as ours. In both cases the judgment and the instrument predate the attachment, but neither the judgment nor the instrument holder made an attachment.

The court decided that as the date of the instrument (equivalent in the article to a judgment) was prior to the attachment, and the *attachment only gives priority over claims of an equal nature contracted on a date subsequent to that of the attachment,* the attacher has no priority over the instrument holder, in spite of the precedence of the attachment.

The Court of Appeals misread the *Rodriguez* case,[8] and ruled it inapplicable, saying it "held that a prior *mortgage* on certain property had priority over a cautionary notice of attachment on the property! Quite the opposite, the holding of the court was against the existence of the mortgage. The court said: "That a valid sub-mortgage *was not* constituted in favor of the intervenor by the deed of July, 19, 1932, *can not be disputed. The intervenor itself so*

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8. The court dismissed by footnote the claim of bad faith against FDIC, saying "it was not raised in a timely fashion". The record shows otherwise. (*See* 42a-47a). On the other hand, FDIC *never* pled *res judicata* which is an affirmative defense. The Appeals Court *motu proprio* raised it.

acknowledges . . ." That's why the case was decided under Article 1824(4)(a) and why it is applicable to the situation, under section (b). The court said, applying Article 1824(4)(a) to the instant case, that as "it must be concluded that as whatever preferential right that the plaintiff might invoke must be with regard to claims of equal nature contracted on a date subsequent to that of the attachment, and as the claim of the intervenor was previously acknowledged in an authentic manner in a public instrument," not a mortgage " such right has no priority over said claim."

The court quoted as authority section 1824 of the Civil Code and added:

> And even if that provision were not applicable in the present case, the latter should always be decided in favor of the intervenor, in accordance with the principle of law "*Quit prior est tempore potior est jure,*" in regard to which the Supreme Court of Spain, in a judgment of May 10, 1881, held as follows: "Where ordinary personal claims are involved, that which is prior in time should be reimbursed first, and failure to do so is an infringement of the juridical principle: *qui prior est tempore potior est jure.*

Scaevola, Civil Code, Vol. 2, Appendix, p. 192.

As stated in the *Rodriguez* case, the *prior tempore* refers to the substantive right itself, not to the procedural attachment, as they have no priority over "the claim of the intervenor previously acknowledged in an authentic manner in a (judgment or) public instrument."

Allow me to make two short quotes from Spanish

commentators to the Civil Code. Scaevola, Vol. 31, page 702 in his *Comentarios al Codigo Civil* states that attachments in the Registry do not improve the condition of the credit except in relation to those subsequent to the annotation and *those prior that have no preference.* And that is not even the attachment FDIC made. He further adds, on page 661:

> According to the above, it can be said the public instrument and the *final judgment* confer the credits therein embodied with preferential effects that transcend the initial inter-parties relation, as they can be opposed to other creditors who were not parties to the transaction of the document nor the judicial process, and said "reflection" effect gives them the right due to the guarantee afforded by the judicial certificate.

The "reflection effect" applies to public instruments and judgments equally. He adds that the only object of the third party intervention is the comparison of the titles to determine priority and subsequent preference between the two credits in dispute. And if the intervention is made before "such balance ha(s) not been disposed of . . . (but) it had merely been attached at the time the intervenor's claim was filed" its preference must be recognized. *Rodriguez, supra.*

Manresa states that:

> . . . any additional creditor, *besides the attaching creditor* and the debtor whose property has been attached, may by third claim of a better right contest the preference his credit has over the one that is being collected . . . and such has been *constantly* allowed by

> the Courts, and in said instances they must apply the *rules of preference of Title XVII, Book IV of the Code.*

Comentarios al Codigo Civil Espanol, page 737 (1951).

Finally, in 1974 the case of *Wholesalers Chamber of Commerce v. Superior Court, Sucesores de Esmoris & Co. Inc.*, 2 P.R. Supreme Court Official Translations, 838 was decided. The court said in a footnote that "it will be the judgment, and not the attachment, what gives preference to the credit. Article 1824 of the Civil Code, infra."

CONCLUSION

We submit the following affirmations as legitimate, according to our reading of the Civil Code, court decisions and commentators:

(i) The *Oronoz* case applies only to attachments performed by *common* creditors. Between them the first to attach is the first to collect; (ii) Creditors accorded preference by statute – Articles 1822 to 1824(a) and (b) collect according to the quality of their preference; (iii) A *prior* attachment by a common creditor does not invalidate the credit preference awarded by statute. *Rodriguez v. Solivellas & Co., supra, Wholesalers, supra;* (iv) FDIC and Banco are judgment creditors. As to judgment creditors, the one with the prior judgment (dates) has preference over the one with the subsequent judgment; (v) FDIC did not act with clean hands in preventing Banco from legally performing its attachment in 1987, nor by *sub rosa,* squeezing its attachment in 1990, trying unfairly to get a priority it did not have; (vi) Banco's prior judgment has priority for its "graduation and payment" over FDIC's subsequent judgment as stated by our classification of credits articles.

WHEREFORE, petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals, First Circuit, to review the judgment of August 27, 1993, and grant priority to Banco's attachment and judgment. Should conclusions of fact be deemed necessary for the proper adjudication of this case, it is suggested the case be remanded to the District Court for an evidentiary hearing on the facts, which evidentiary hearing was never granted, though requested.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING FILED AUGUST 31, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1651

FEDERAL DEPOSIT INSURANCE CORPORATION,

Cross-Plaintiff, Appellee,

v.

SHEARSON-AMERICAN EXPRESS, INC., ET AL.,

Cross-Defendants.

BANCO COOPERATIVO DE PUERTO RICO,

Intervenor-Appellant.

No. 92-1652

FEDERAL DEPOSIT INSURANCE CORPORATION,

Cross-Plaintiff, Appellee,

v.

SHEARSON-AMERICAN EXPRESS, INC., ET AL.,

Cross-Defendants

PRUDENTIAL BACH SECURITIES, INC.,

Intervenor-Appellant.

Appendix A

BEFORE

BREYER, Chief Judge,
Campbell, Senior Circuit Judge,
*, Selya, Cyr, Boudin, Stahl, Circuit Judges,
SKINNER, ** Senior District Judge.

ORDER OF COURT

Entered; August 27, 1993

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing submitted by Banco Cooperativo De Puerto Rico and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Fernandez-Bared, Perez-Marrero and Peral]

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* Judge Torruella has recused himself.

** Of the District of Massachusetts, sitting by designation.

APPENDIX B — JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT FILED JUNE 24, 1993

United States Court of Appeals
For the First Circuit

No. 92-1651

FEDERAL DEPOSIT INSURANCE CORPORATION,

Cross-Plaintiff, Appellee,

v.

SHEARSON-AMERICAN EXPRESS, INC., ET AL.,

Cross-Defendants.

BANCO COOPERATIVO DE PUERTO RICO,

Intervenor, Appellant.

No. 92-1652

FEDERAL DEPOSIT INSURANCE CORPORATION,

Cross-Plaintiff, Appellee,

v.

SHEARSON-AMERICAN EXPRESS, INC., ET AL.,

Cross-Defendants.

PRUDENTIAL BACHE SECURITIES, INC.,

Intervenor, Appellant.

Appendix B

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, *U.S. District Judge*]

Before

Stahl, *Circuit Judge*,

Campbell, *Senior Circuit Judge*, and Skinner,* *Senior District Judge*.

Manuel Fernandez-Bared and *Ramon Coto-Ojeda* with whom *Nestor M. Mendez-Gomez* and *McConnel Valdes Kelley Sifre Griggs & Ruiz-Suria* were on brief for intervenor, appellant Prudential Bache Securities, Inc.

Plinio Perez Marrero for intervenor, appellant Banco Cooperativo De Puerto Rico.

Enrigue Peral with whom *Munoz Boneta Gonzalez Arbona Benitez & Peral, Ann S. Duross*, General Counsel, *Colleen B. Bombardier*, Senior Counsel, *Jaclyn C. Taner*, Counsel, and *Richard Schwartz* were on brief for cross-plaintiff, appellee.

June 24, 1993

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* Of the District of Massachusetts, sitting by designation.

Appendix B

CAMPBELL, *Senior Circuit Judge*. In these appeals, two creditors challenge appellee's rights to the assets of the mastermind of a multimillion dollar fraud, each creditor claiming that it has a superior claim to the money.

Miguel Serrano Arreche ("Serrano"), a former Puerto Rico stockbroker, was indicted and convicted in 1985 of wire fraud, mail fraud, and other violations of federal criminal statutes. Serrano's misdeeds have been extensively chronicled elsewhere. *See, e.g., United States v. Serrano*, 870 F.2d 1, 3-5 (1st Cir. 1989).[1] The primary victim of Serrano's fraud was Home Federal Savings and Loan Association ("Home Federal"), a Puerto Rico bank which collapsed partly from losses caused by Serrano. *United States v. Serrano*, 870 F.2d at 4. The Federal Savings and Loan Insurance Corporation ("FSLIC") took control in 1985 and, thereafter, the appellee Federal Deposit Insurance Corporation ("FDIC") became Home Federal's successor in interest pursuant to the Financial Institutions Recovery, Reform, and Enforcement Act of 1989. *See* 12 U.S.C. § 1821a *et seq.*

The present action was brought in 1984 in the United States District Court for the District of Puerto Rico by the Municipality of Ponce, against defendants that included Home Federal, Serrano, Shearson Lehman Brothers, Inc., and Shearson Lehman Brothers,

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1. *See also United States v. Tormos-Vega*, 959 F.2d 1103 (1st Cir.), *cert. denied*, 113 S. Ct. 191 (1992); *FDIC v. CNA Casualty of Puerto Rico*, 786 F. Supp. 1082 (D.P.R. 1991); *United States v. Serrano*, 680 F. Supp. 58 (D.P.R. 1988), *modified*, 870 F.2d 1 (1st Cir. 1989); *FSLIC v. Shearson-American Express, Inc.*, 658 F. Supp. 1331 (D.P.R. 1987); *United States v. Tormos-Vega*, 656 F. Supp. 1525 (D.P.R. 1987), *aff'd, United States v. Boscio*, 843 F.2d 1384 (1st Cir.), *cert. denied*, 488 U.S. 848 (1988); *United States v. Serrano*, 637 F. Supp. 12 (D.P.R. 1985); *United States v. Serrano*, 622 F. Supp. 517 (D.P.R. 1985).

Inc. (Puerto Rico) (collectively "Shearson"). Home Federal filed cross-claims against Serrano, Shearson, and others. Both the Municipality of Ponce and Shearson settled and left the case. On October 16, 1989, the district court entered a default judgment for the FDIC (now representing Home Federal) on its cross-claims against Serrano, finding Serrano liable to the FDIC for $44,265,241. Thereafter, on May 17, 1990, the FDIC secured from the district court an order attaching Serrano's assets to enforce the foregoing judgment.

This appeal stems from efforts by two other creditors, appellants Prudential-Bache Securities, Inc. ("Prudential") and Banco Cooperativo ("Banco"), to intervene in the same district court action after certain of Serrano's assets were transferred to the district court pursuant to the FDIC's attachment. Prudential and Banco asked the district court to withdraw its order authorizing disbursement of Serrano's funds to the FDIC, and are appealing from its refusal to do so.

To understand the present dispute, it is necessary to realize that in September 1987, Serrano had petitioned for bankruptcy in the United States Bankruptcy Court for the District of Puerto Rico, triggering the automatic stay of 11 U.S.C. § 362. The FSLIC sought and received partial relief from the stay on January 13, 1989, permitting the instant action to continue in the district court until entry of judgment. Serrano's only significant assets were 32,400 shares of Bayamón Federal Savings Bank stock, which at one time had been held in a trading account at Prudential.[2] By order of the bankruptcy court, the stock was sold for approximately $700,000

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2. Earlier in 1987 Prudential had delivered the stock to the United States District Court pursuant to a court order in *United States v. Serrano*, Crim. No. 84-381(JP).

in April 1989 and the proceeds were deposited with the bankruptcy court as property of the estate. On November 17, 1988, Prudential filed its own claim in the bankruptcy proceeding. On October 16, 1989, as we have said, the district court entered a judgment for the FDIC in its cross-claims against Serrano.

On May 16, 1990, the bankruptcy court issued an order dismissing Serrano's bankruptcy case, but expressly retaining jurisdiction to decide how to dispose of all funds held for Serrano. The bankruptcy court gave all creditors, which included Prudential, eleven days to express their positions as to the disposal of these funds, indicating that unless otherwise ordered, they would be returned to Serrano. *See* 11 U.S.C. § 349(b)(3). That same day, after entry of the bankruptcy petition dismissal, the FDIC moved in the district court for a writ of attachment and execution, to be served upon the bankruptcy court and any custodian of Serrano's funds in that court, attaching Serrano's funds after payment of administrative expenses and directing their transfer to the district court for application to the FDIC's judgment. The district court allowed the motion on May 17, 1990, ordering the bankruptcy court within twenty days to deliver to the district court clerk the remaining funds belonging to Serrano subsequent to the payment of the administrative expenses, and directing that Serrano refrain from collecting the funds. A copy of this attachment was shown to Prudential's counsel on May 18, 1990, at a meeting of creditors called by Prudential at its offices to discuss disposition of the bankruptcy funds. Prudential made no effort in the bankruptcy court to challenge the validity of the attachment nor to argue that its own claim should be paid from the bankruptcy funds in preference to the FDIC's claim.

On June 27, 1990, the bankruptcy court issued its order disposing of all the assets in Serrano's case. The bankruptcy court

clerk, after paying various fees, expenses and a child support claim, was directed by the bankruptcy court to deliver the remainder to the district court clerk in compliance with the attachment, said funds to remain subject to any liens as per the bankruptcy court's previous order of sale of the stock. Pursuant to this order, the bankruptcy clerk paid over more than $560,000 to the clerk of the district court. On August 10, 1990, the district court ordered the funds disbursed to the FDIC.

Five days after the district court had entered its disbursement order, Prudential made its first appearance in this action. On August 15, 1990, Prudential moved the district court to allow it to intervene in the instant action and stay the scheduled disbursement to the FDIC, alleging that it had a lien on the attached funds that had priority over the FDIC's attachment. *See* Fed. R. Civ. P. 24.[3]

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3. Federal Rule of Civil Procedure 24 provides, in relevant part:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to, intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Appendix B

The district court stayed the disbursement pending ruling on Prudential's motion to intervene. On August 20, 1990, Banco Cooperativo, which also had never before been a party to this action, moved to intervene, asserting that it had a priority claim to the attached funds.[4]

On March 11, 1992, the district court, after considering the parties' motions and exhibits submitted in support of their claims (and without specifically indicating whether it was ruling on the motions to intervene or on the merits), denied Prudential's and Banco's claims and lifted the stay of the disbursement of the funds to the FDIC. Prudential and Banco appealed separately from the district court's final order. We consolidated their appeals, and now affirm.[5]

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4. Appellee FDIC does not contest the existence of the appellants' purported claims against Serrano. Banco Cooperativo claims that it sued Prudential in a Puerto Rico court in 1984, seeking damages for embezzlement by Serrano during his tenure, in 1980, as an officer of Prudential's Institutional Department. In 1985, Prudential filed a third-party complaint against Serrano in that case, asking that Serrano be held liable for the amount of any judgment which may be entered against Prudential in the action brought by Banco Cooperativo.

Banco claims that it eventually received a judgment against *Serrano* in the amount of $295,000 plus interest. (Banco does not explain how it obtained a judgment against Serrano when it had sought damages only from Prudential.) At the time Prudential filed its motion to intervene, its claim against Serrano was still contingent, as final judgment had not yet been rendered in its third-party action.

5. The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, because the original plaintiff, Municipality of Ponce, brought federal claims against the defendants. This court has jurisdiction over the appeals pursuant to 28 U.S.C. § 1291.

Appendix B

No. 92-1652 — Prudential

Appellant Prudential raises three issues on appeal. The first, discussed in Section A below, concerns the validity of the FDIC's attachment, an issue implicitly decided by the bankruptcy court's order to release Serrano's funds in compliance with the attachment. We hold, *infra*, that *res judicata* bars Prudential from raising the issue anew.

The other two issues raised by Prudential, discussed in Sections B and C below, concern the priority of its alleged lien relative to the FDIC's attachment. The questions of priority among liens on Serrano's property and of the validity of Prudential's lien — unlike the validity of the FDIC's attachment — formed no part of the bankruptcy court's decision and so are not barred from being raised now. The bankruptcy court, when it ordered the funds to be turned over in compliance with the FDIC's attachment, made clear that "said funds remain subject to any liens as per our order of sale." The bankruptcy court's order of sale, dated April 27, 1989, approved the liquidation of the stock shares "provided the proceeds from the surrender of the shares are to be deposited with the Clerk of the United States Bankruptcy Court for the District of Puerto Rico, in an interest bearing account *with liens, if and, attaching to said Proceeds* . . . ." (emphasis added). The court dismissed the bankruptcy petition before ever adjudging the validity of Prudential's alleged secured claim on the proceeds and without deciding whether the FDIC's attachment took priority over other liens on the proceeds. *Res judicata*, therefore, does not bar Prudential from now raising those questions, and we address them on their merits.

Appendix B

A. *Validity of FDIC's Attachment*

Prudential's first argument is that the district court should have declared the FDIC's attachment null and void because it was obtained in violation of the automatic stay allegedly still in effect in Serrano's bankruptcy case. *See* 11 U.S.C. § 362. It is Prudential's theory that Fed. R. Civ. P. 62(a), applying by force of Bankruptcy Rules 7062 and 9014, extended the automatic stay of 11 U.S.C. § 362 for ten days after the bankruptcy court had dismissed Serrano's bankruptcy petition. This argument has met with little success in other cases involving similar circumstances. *See In re de Jesus Daez*, 721 F.2d 848, 851-52 (1st Cir. 1983); *In re Weston*, 101 B.R. 202, 203-06 (Bankr. E.D. Cal. 1989), *aff'd*, 967 F.2d 596 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 973 (1993). Prudential's standing to challenge an alleged violation of the automatic stay is also problematic. *See In re Pecan Groves of Arizona*, 951 F.2d 242, 245 (9th Cir. 1991) ("Language from many cases indicates that, if the trustee does not seek to enforce the protections of the automatic stay, no other party may challenge acts purportedly in violation of the automatic stay."). We do not pass on these issues, however, as we are satisfied, *infra*, that Prudential is barred by *res judicata* from raising the automatic stay as a bar.[6] We add that it would be difficult to pass on the merits of the automatic stay issue from the record now before us, which does not include a full report of the bankruptcy proceedings and, in particular, omits much information relevant to the stay and to orders issued lifting the stay in respect to the district court proceeding in question.

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6. Although the district court did not rely upon the grounds of *res judicata*, and the parties ignored this theory on appeal, we may do so as we need not limit ourselves to the exact grounds for decision utilized below. *Watterson v. Page*, 987 F.2d 1, 7 n.3 (1st Cir. 1993); *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 6 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1416 (1993).

Appendix B

This court recently explained:

> The doctrine of *res judicata* bars all parties and their privies from relitigating issues which were raised or *could have been raised* in a previous action, once a court has entered a final judgment on the merits in the previous action. *United States v. Alky Enterprises, Inc.*, 969 F.2d 1309, 1314 (lst Cir. 1992). The essential elements of *res judicata,* or claim preclusion, are (1) a final judgment on the merits in an earlier action; (2) an identity of parties or privies in the two suits; and (3) an identity of the cause of action in both the earlier and later suits. *Kale v. Combined Insurance Co. of America,* 924 F.2d 1161, 1165 (lst Cir.), *cert. denied,* __ U.S. __, 112 S. Ct. 69, 116 L. Ed. 2d 44 (1991).

Aunyx Corp. v. Canon U.S.A., Inc., 978 F.2d 3, 6 (lst Cir. 1992), *cert. denied,* 113 S. Ct. 1416 (1993) (emphasis in original). "The normal rules of *res judicata* and collateral estoppel apply to the decisions of the bankruptcy courts." *Katchen v. Landy,* 382 U.S. 323, 334 (1966); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 375-78 (1940); *Turshen v. Chapman,* 823 F.2d 836, 839 (4th Cir. 1987); *see generally* lB James Wm. Moore *et al., Moore's Federal Practice* ¶ 0.419[3] (2d ed. 1993). Orders, judgments and decrees of the bankruptcy court from which an appeal is not timely taken are final, 1 *Collier on Bankruptcy* ¶ 3.03[4], at 3-179 (Lawrence P. King ed., 15th ed. 1993), even if erroneous. *Union Joint Stock Land Bank v. Byerly,* 310 U.S. 1, 7-8 (1940); *Van Huffel v. Harkelrode,* 284 U.S. 225, 227 (1931). While actions taken in violation of the automatic stay are often

characterized as void and without effect, orders of the bankruptcy court modifying the stay or finding no violation, even if erroneous, are entitled to respect and are not subject to collateral attack. *See Union Joint Stock Land Bank*, 310 U.S. at 7-8 ("The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable, but not void, and was not to be disregarded or attacked collaterally . . . ."); 1B *Moore's Federal Practice* ¶ 4.19[3-.2], at 635.

All the elements of *res judicata* are met here. First, by its final order on June 27, 1990, transferring Serrano's funds in compliance with the attachment, the bankruptcy court rendered a final judgment that the attachment was valid. After dismissing Serrano's bankruptcy case, the bankruptcy court had retained jurisdiction to determine whether to return the debtor's funds to him or to another, and gave all the creditors, of whom Prudential was one, eleven days to "express their positions as to the disposal of these funds." Prudential's counsel appeared at the hearing in the bankruptcy court directly before issuance of the order dismissing the bankruptcy case, at which time the court indicated that that order was contemplated and said that it intended to grant the creditors ten or eleven days to "let me know what I should do with these funds." In fact, on May 17, 1990, Prudential's counsel invited the attorneys for other creditors, including the FDIC's counsel, to a meeting at Prudential's offices to discuss the disposition of the funds. This meeting took place on May 18, 1990, at which time the FDIC's counsel showed to Prudential a copy of the attachment order it had just obtained in the district court. Notwithstanding the foregoing, Prudential never advised the bankruptcy court of its present contention that the FDIC'S attachment was invalid, being in supposed violation of the automatic stay, nor did it urge the bankruptcy court to refuse to honor the attachment. Prudential's inaction is in notable contrast to that of another creditor, Shearson

Lehman, which, on June 5, 1990, moved the bankruptcy court to declare the attachment null and void in violation of the automatic stay — the very same contention Prudential belatedly raises now. Shearson Lehman's contention was expressly denied by the bankruptcy court on June 27, 1990, in its final order. In that same order, the bankruptcy court disposed of the balance of the funds in express compliance with the attachment, after first ordering the payment of certain fees, expenses and other items. The bankruptcy court's June 27 order constituted an appealable final judgment. *In re Parque Forestal, Inc.*, 949 F.2d 504, 508-09 (lst Cir. 1991). However, Prudential took no appeal.

Second, Prudential does not deny that, as one of Serrano's creditors, it was a party to the bankruptcy proceedings, nor that it was fully cognizant on May 16-18, 1990, of the bankruptcy court's dismissal of Serrano's case, of its retention of jurisdiction, and of the FDIC's attachment. Nor can Prudential deny that it knew of the bankruptcy court's invitation to all creditors to express their positions as to the future disposition of the funds.

Despite this, Prudential complains that since it received no formal notice from the district court of the FDIC's attachment, it was not a party to the dispute over the attachment. We cannot see, for purposes of any act Prudential might have taken in the bankruptcy court, that the absence of notice from the district court was material. Prudential was fully cognizant that the bankruptcy court intended to take action in June on the question of disposal of Serrano's assets, including the effect of the attachment. Yet Prudential took no steps to pursue the matter before the bankruptcy judge, including — in particular — to raise the bankruptcy-related issue of the effect of the automatic stay on the validity of the attachment. We are satisfied that Prudential was a party to the proceedings in the bankruptcy court over the ultimate disposition of Serrano's assets — proceedings that ended with the bankruptcy

court's recognition of the FDIC's district court attachment and its direction to turn over the assets in compliance therewith.

Finally, Prudential's current challenge to the attachment based on the automatic stay implicates the very same underlying issue resolved by the bankruptcy court when it gave effect to the attachment. The bankruptcy court's final order of June 27, 1990 necessarily required it to have determined whether or not the FDIC's attachment was valid so as to be entitled to effect. The bankruptcy court clearly had jurisdiction to make that determination and, in particular, had jurisdiction to adjudicate any claim of invalidity based on purported violation of the automatic stay. *See* 11 U.S.C. § 105(a) (authorizing bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); 11 U.S.C. § 362(d), (f) (authorizing court to grant relief from stay); 1 *Collier on Bankruptcy* ¶ 362.01[1], at 362-9 ("[T]he bankruptcy court, as a court of equity exercising *in rem* jurisdiction over assets in its custody and control, can protect its jurisdiction by injunction, whether or not such power is expressly set forth . . . ."); *see generally In re Continental Air Lines*, 61 B.R. 758 (S.D. Tex. 1986) (discussing jurisdiction of bankruptcy court over enforcement of automatic stay).

As already noted, another creditor, Shearson Lehman, moved in the bankruptcy court to have the attachment declared null and void for precisely the same reasons Prudential now advances, *viz.*, that the FDIC had allegedly violated the automatic stay when it sought and received an order from the district court attaching bankruptcy assets within one day after the bankruptcy court had dismissed Serrano's petition.[7] The bankruptcy court included in its

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7. The text of Prudential's current brief on this issue matches *verbatim* whole portions of Shearson's motion on this issue before the bankruptcy court.

June 27, 1990 order a specific denial of Shearson Lehman's motion, indicating by that ruling its absence of doubt concerning the existence of jurisdiction to adjudicate the claimed bar of the automatic stay.

Prudential never made a similar motion nor in any way challenged the attachment in the bankruptcy court, nor did it appeal from the bankruptcy court's order recognizing the FDIC's attachment. Instead, after the bankruptcy court had acted and the attachment had been fully executed, Prudential petitioned to intervene in the attaching district court for the purpose of arguing, post hoc, that the bankruptcy automatic stay had invalidated the attachment.[8] By the time of its petition, a final judgment giving effect to the attachment was in effect in the bankruptcy court. As *res judicata* now bars a collateral attack on the bankruptcy court's judgment, we treat the FDIC's attachment as valid.

B. *Pledge Agreement*

Prudential says that, even assuming the FDIC had a valid attachment on the stock proceeds, Prudential holds a superior lien on the proceeds by virtue of a form signed by Serrano to open a brokerage account at Prudential (the "Customer Agreement").[9]

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8. While Prudential was not formally noticed as to the attachment, it learned about it from the FDIC's counsel on May 18, 1990, and, as an additional course, could have promptly sought to intervene in the district court in hopes of quashing the attachment before it was executed in the bankruptcy court. Instead, Prudential waited for nearly three months, until well after execution of the attachment, before doing anything.

9. The Customer Agreement provided, in part:

> I [Serrano] agree, as follows, with respect to all the

(Cont'd)

Appendix B

Prudential contends that the Customer Agreement operated, under Puerto Rico law, as a "pledge" of any securities held in the brokerage account. By virtue of this pledge, Prudential reasons, it acquired a lien over the Bayamón Federal stock shares and their proceeds prior to the FDIC's attachment because the stock was, up until 1987, held in Serrano's account at Prudential.

The district court correctly rejected Prudential's argument. Puerto Rico law provides, "A pledge shall not be effective against a third person, when evidence of its date is not shown by authentic documents." 31 L.P.R.A. § 5023. The Supreme Court of Puerto Rico has stated: "An authentic document is a legalized document, which is publicly attested, which is legally valid by itself." *Ramos Mimoso v. Tribunal Superior,* 93 P.R.R. 538, 540 (1966). A private agreement or writing is not an authentic document; a document verified before a notary public is an authentic document. *In re Santos & Nieves, Inc.,* 814 F.2d 57, 60 (lst Cir. 1987); *Ramos Mimoso,* 93 P.R.R. at 541. The record here supports the district court's finding that no notarized or other properly authenticated

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(Cont'd)

> accounts in which I have an interest alone or with others, which I have opened or open with you [Prudential] for the purchase and sale of securities and commodities:
>
> . . .
>
> Any and all credit balances, securities, or contracts relating thereto and all other property of whatever kind belonging to me or in which I have an interest held by you or carried for my accounts shall be subject to a general lien for the discharge of my obligations to you (including unmatured and contingent obligations) however arising . . . .

document evidenced the date of Serrano's alleged pledge of the stock shares. The only document alleging to show the date of the supposed pledge is the Customer Agreement, which is merely signed by the parties and not notarized.

Prudential concedes that no notarized or otherwise "authentic" document exists to evidence the date of the pledge, but argues that it is sufficient that the *purpose* of the authentic document requirement was fulfilled. Prudential filed a copy of the Customer Agreement in 1987 with the clerk of a court in which criminal proceedings against Serrano were being conducted, and now argues that this filing satisfies the policy behind 31 L.P.R.A. § 5023. However, the authentic document rule is "a formal and absolute rule" that is strictly construed. *In re Supermercados San Juan, Inc.*, 575 F.2d 8, 12 (lst Cir. 1978); *Trueba v. Zalduondo*, 34 P.R.R. 713, 716 (1925). Neither section 5023 nor any cases interpreting it support Prudential's theory that the authentic document requirement can be fulfilled simply by filing a copy of an unnotarized document in court.

Prudential attempts to analogize this case to *Trueba v. Zalduondo*, 34 P.R.R. 713 (1925), in which the Supreme Court of Puerto Rico held that a transfer of corporate stocks as collateral for a loan that was recorded in the corporations' official records was valid against later-attaching third parties, even though the transfer did not comply with the authentic document rule codified in the predecessor statute to 31 L.P.R.A. § 5023. However, *Trueba* expressly held that section 13 of the Private Corporations Act, (now codified as 14 L.P.R.A. § 1509), and not the predecessor to 31 L.P.R.A. § 5023, governed under those circumstances. The *Trueba* decision "was based on the fact that stock so transferred would be authenticated by the public and formal records of the corporation as a transfer of a security interest." *In re Supermercados San Juan,*

Inc., 575 F.2d at 12. The *Trueba* court did not create an exception to section 5023 and, in fact, reiterated that the authentic document rule "is a rigid rule." *Trueba*, 34 P.R.R. at 716. Because Prudential does not contend that the Private Corporations Act, as opposed to 31 L.P.R.A. § 5023, governs this case, *Trueba* is inapposite.[10]

The district court correctly held that Prudential's purported pledge agreement did not comply with the authentic document requirement of 31 L.P.R.A. § 5023 and thus was not valid against the FDIC as a pledge.

C. *Puerto Rico Agency Law*

Prudential argues that it acted as Serrano's agent for the purchase and sale of securities and, as such, acquired a statutory lien on all securities held on behalf of Serrano, including the Bayamón Federal stock. Prudential points to a Puerto Rican statute providing that, "The agent may retain the things which are the objects of the agency in pledge until the principal pays the indemnity and reimbursement referred to in the two preceding sections [§§ 4462, 4463]." 31 L.P.R.A. § 4464. Prudential misinterprets the statute, however. Even if Prudential were Serrano's agent, section 4464 does not give it a lien on the stock proceeds superior to the FDIC's attachment because Prudential did not "retain the things," *viz.*, the Bayamón Federal stock

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10. Prudential's citation of *In re Las Colinas, Inc.*, 294 F. Supp. 582 (1968), *vacated and remanded*, 426 F.2d 1005 (1st Cir. 1970), is similarly unhelpful. Even if parts of it remain good law, the relevant issue in that case was whether certain collateral, transferred after a pledge agreement was notarized and signed, constituted a valid pledge of that collateral. *Id.* at 602-03; *see also Omega Int'l Corp. v. Interstate Steel de Puerto Rico, Inc.*, 590 F. Supp. 844, 850 (D.P.R. 1984) (explaining *In re Las Colinas*). Here, Prudential concedes that there was no notarized pledge agreement.

certificates. The stock was transferred to a court in 1987 pursuant to a court order, and was subsequently liquidated. We find no authority for the proposition that section 4464 creates statutory liens on things, let alone their proceeds, which are not retained by the agent. For this reason alone, the district court's ruling that Prudential does not have a lien over the stock pursuant to Puerto Rico agency law was plainly correct.[11]

The district court did not err in finding that Prudential had no lien with priority over the FDIC's attachment and in dismissing Prudential's claims over the funds attached by the FDIC.[12]

II.

No. 92-1652 — Banco Cooperativo

Appellant Banco Cooperativo says that it obtained a judgment and award of damages against Serrano on September 15, 1987 from a Puerto Rico court in a civil action. Banco never executed the judgment, attached the funds that are the subject of this appeal, or otherwise obtained a lien on any of Serrano's property. Banco also concedes that the FDIC obtained a valid judgment against Serrano on October 16, 1989, and properly executed the judgment by

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11. The district court also found that section 4464 was inapplicable because Serrano's alleged liability to Prudential is unrelated to the stock shares previously held in his account and because the liability was merely contingent, not due and payable. *See* I-II Jose Puig Brutau, *Fundamentos de Derecho* Civil 545-46 (2d ed. 1976).

12. Prudential also makes various arguments based on New York law. We do not consider any of them as Prudential makes no argument on appeal that the district court erred in determining that Puerto Rico law, not New York law, governs this case. *See* Fed. R. App. P. 28(a)(3), (5).

attaching the funds at issue on May 17, 1990. Banco contends, nonetheless, that Puerto Rico law gives its claim on Serrano's assets priority over the FDIC's.

We agree with the district court that the statute on which Banco relies, 31 L.P.R.A. § 5194, does not apply here. The first provision of Title 31, Chapter 399 provides: "Credits shall be classified for their graduation and payment in the order and manner specified in this chapter." 31 L.P.R.A. § 5191. 31 L.P.R.A. § 5194 provides in part:

> With regard to all other personal and real property of the debtor, preference shall be given to: . . .
>
> (4) Indebtedness which without a special privilege appear:
>
> (a) In a public instrument.
>
> (b) In a final judgment, should they have been the object of litigation.
>
> These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments.

Banco interprets section 5194(4) to mean that its claim to the funds has "preference" over the FDIC's claim because Banco obtained its judgment two years before the FDIC was awarded its judgment. Under Banco's interpretation, section 5194(4) makes irrelevant the fact that the FDIC attached the property in dispute and Banco did not.

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The Supreme Court of Puerto Rico has consistently held otherwise, finding that 31 L.P.R.A. § 5194 does not supplant the standard rule that, as between two judgment creditors without other liens, the first creditor to attach has priority. In *Oronoz & Co. v. Alvarez*, 23 P.R.R. 497 (1916), the Court rejected the argument that a creditor always has priority if it has a judgment antedating the judgment of other creditors. *Id.* at 500. The Court explained:

> We have recently decided that mere priority in judgment gives the prior creditor no lien. *Auffant v. Succession of Manuel de J. Ramos et al.*, [23 P.R.R. 385 (1916)]. An attachment or other similar step is necessary to give the judgment a priority and as between judgment creditors the first to attach has the priority. It is a race of diligence. The priority of payments to which sections 1822 *et seq.* of the Civil Code [31 L.P.R.A. § 5191 *et seq.*] relate has no application to attachments.

Id. The Court reaffirmed the first-to-attach rule in *Puerto Rico Bedding Mfg. Corp. v. Herger*, 91 P.R.R. 503 (1964), writing that, "There is no question that among common creditors the first one who attaches has preference over the others . . . ." *Id.* at 507. The Court clarified that the preference created by attachment "does not go beyond the right which the debtor may have over the property attached," meaning that valid liens already on the property when attached cannot be defeated by an attachment. *Id. In Empresas Capote, Inc. v. Superior Court*, 3 P.R. Sup. Ct. Off'l Translations 1067 (1975), the Supreme Court of Puerto Rico reiterated, "It should be remembered that, grounded on the axiom *prior tempore portior jure*, even among common creditors, '. . . the first one who attaches has preferences over the others, but such preference does

not go beyond the right which the debtor may have over the property attached.' " *Id.* at 1078-79 (quoting *Puerto Rico Bedding Mfg. Corp. v. Herger,* 91 P.R.R. 503, 507 (1964)).

Some provisions of Chapter 399 other than 31 L.P.R.A. § 5194 create statutory preferences, a concept equivalent to statutory liens, on certain types of property. These statutory preferences take priority over attachments even if the preference holder does not formally attach the property. For example, 31 L.P.R.A. § 5192(1) creates, in essence, a seller's lien "for the amount of the sale of [the] personal property which may be in possession of the debtor to the extent of the value of the same." 31 L.P.R.A. § 5192(1); *see In re Jack's Club & Hotel,* 138 F. Supp. 620, 622 (D.P.R. 1956). Thus, the credit of a manufacturer who was not paid for mattresses and bed frames it sold to a retail store had priority over the credit of another creditor who attached the items in the store. *Puerto Rico Bedding Mfg. Corp.,* 91 P.R.R. at 507-09. While the attachment created a preference, or lien, in favor of the attaching creditor, "such preference does not go beyond the right which the debtor may have over the property attached." *Id.* at 507-08. That is, 31 L.P.R.A. § 5192, without the need for execution or attachment, gives the seller an interest in the property sold that diminishes the debtor's interest in the property and that cannot be defeated by attaching creditors. *See also Heirs of Garriga v. O'Meara,* 28 P.R.R. 332, 334-35 (1920) (discussing priority of the statutory preferences created by 31 L.P.R.A. § 5192 over attachments).

In contrast, 31 L.P.R.A. § 5194(4) does not create a seller's lien or any other type of statutory lien on property of the debtor. It does not refer to specific property of the debtor or specific transactions between the creditor and debtor. *Compare* 31 L.P.R.A. § 5192(3) (creating lien for the costs of transportation on goods transported by creditor) *and* 31 L.P.R.A. § 5192(6) (creating lien on fruit crops in favor of creditor who provided seeds) *with* 31

L.P.R.A. § 5194(4) (referring to no specific property). The silence of § 5194(4) implies that a general judgment creditor must execute its judgment by attaching property, such as the debtor's cash or stock certificates, before it can claim any sort of "lien" on that property.

Here, the FDIC and Banco were both judgment creditors, but the FDIC, by attaching the stock proceeds, obtained a lien on those proceeds which has priority over Banco's unexecuted judgment against the debtor. Banco had no lien or other legally-recognized property interest in Serrano's assets at the time of the attachment. All it had was an unsecured credit in its favor as the result of a court judgment. Thus, the FDIC's attachment reached *all* of the funds released by the bankruptcy court and is not subject to a claim by Banco.

For these reasons, the district court did not err in determining that 31 L.P.R.A. § 5194(4) does not give Banco, which did not execute its judgment, priority over the FDIC, which obtained a valid attachment of the funds.[13] Therefore, the district court properly dismissed Banco Cooperativo's claim.[14]

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13. We have considered and found no merit in Banco's myriad other arguments. For example, we do not have the authority to declare *Oronoz & Co.* to be wrongly decided by the Puerto Rico Supreme Court or mistranslated by the official court translator, as Banco urges us to do. The case of *Rodríguez v. Solivellas & Co.*, 49 P.R.R. 618 (1936), which discussed 31 L.P.R.A. § 5194, held that a prior mortgage on certain property had priority over a cautionary notice of attachment on the property. It did not hold, as appellant maintains, that attachments have no effect on the rights of judgment creditors with prior claims, but relied instead upon the same principle discussed above, that "[an] attachment is valid only as regards any balance left after cancelling the former security." *Id.* at 623.

14. Banco complains that the district court should have "reprobated" or

(Cont'd)

Appendix B

III.

In conclusion, we find no error and so affirm the district court's order in Appeal No. *92-1652*, dismissing the claims of Prudential, and in Appeal No. *92-1651*, dismissing the claim of Banco Cooperativo to the funds held by the court.

Affirmed. Costs to appellee.

(Cont'd)
sanctioned the FDIC for acting in bad faith when it obtained its attachment. Banco did not raise this issue in a timely fashion, waiting until it moved for reconsideration of the district court's Opinion and Order to bring the issue to the court's attention. Consequently, we will not consider it on appeal. *See Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 352 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). Moreover, we find no evidence in the record to support Banco's allegations of bad faith on the FDIC's part.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-1651

FEDERAL DEPOSIT INSURANCE CORPORATION,

Cross-Plaintiff, Appellee,

v.

SHEARSON-AMERICAN EXPRESS, INC., ET AL.,

Cross-Defendants.

BANCO COOPERATIVO DE PUERTO RICO,

Intervenor-Appellant.

No. 92-1652

FEDERAL DEPOSIT INSURANCE CORPORATION,

Cross-Plaintiff, Appellee,

SHEARSON-AMERICAN EXPRESS, INC., ET AL.,

Cross-Defendants.

PRUDENTIAL BACHE SECURITIES, INC.,

Intervenor-Appellant.

JUDGMENT

Entered: June 24, 1993

Appendix B

These causes came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
DANIEL F. LOUGHRY
Clerk

[cc: Messrs. Fernandez-Bared, Perez-Marrero and Peral]

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO FILED MARCH 11, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 84-758 (RLA)

FEDERAL SAVINGS & LOAN INSURANCE CORPORATION

Cross-Plaintiff,

v.

SHEARSON-AMERICAN EXPRESS, INC., et al.

Cross-Defendants.

OPINION AND ORDER

Before the Court are various motions filed by intervenors Prudential Bache Securities, Inc. ("Prudential"), Banco Cooperativo de Puerto Rico ("Banco Cooperativo") and the Federal Deposit Insurance Corporation as Manager of the Federal Savings and Loan Insurance Corporation Resolution Fund ("FDIC"), a cross-claimant in this case. Prudential and Banco Cooperativo claim liens over the funds which stand attached in favor of the FDIC and which are under the custody of the Clerk of this Court.

Appendix C

I. PROCEDURAL BACKGROUND

In March of 1985 the Federal Savings and Loan Insurance Corporation ("FSLIC")[1] made its first appearance in this case in a motion seeking to be substituted for Home Federal Savings & Loan Association of Puerto Rico ("Home Federal") in cross-claims filed by Home Federal on September 14, 1984 against Shearson Lehman Brothers, Inc. ("Shearson") and Shearson Lehman Brothers, Inc. (Puerto Rico) ("Shearson P.R."), collectively identified as the Shearson Companies, Miguel Serrano Areche ("Serrano"), and Ponce M.A. Developers, Inc. ("PDI"). On December 10, 1985 the FSLIC filed amended cross-claims against the Shearson Companies, Serrano, PDI and others (Docket No. 128).

In November of 1988, the FSLIC and the Shearson Companies reached a settlement on their claims. Thereafter, the FSLIC continued to pursue its claims in this case against cross-defendant Serrano and others. On April 7, 1989, default was entered on the FSLIC's amended cross-claims against Serrano. (Docket No. 455). On August 22, 1989 a default hearing on damages was held concerning, among other matters, the FSLIC's amended cross-claims against Serrano. On October 16, 1989, judgment was entered in this case adjudging Serrano liable to the FDIC in the amount of **$44,265,241.00.**

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1. Upon passage of the Financial Institutions Recovery, Reform and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, Section 215 of FIRREA, 12 USC § 1821 A *et seq.*, the FDIC became the successor in interest of the FSLIC in these proceedings. Since the motions under consideration relate to the rights of the FDIC over the attached funds, reference in this order will sometimes be made to the FDIC.

Appendix C

In September of 1987, Serrano filed a bankruptcy petition under Chapter 11 of the U.S. Bankruptcy Code[2] [Case No. 87-02169(SEK)]. On May 16, 1990, the U.S. Bankruptcy Court, acting upon a motion to dismiss filed by the FSLIC, dismissed Serrano's Chapter 11 bankruptcy petition. Upon the dismissal of the bankruptcy petition on May 16, 1990, the FDIC filed with this Court a Motion for Attachment and Writ of Execution for satisfaction of its judgment against Serrano (Docket No. 491). On May 17, 1990, this Court issued a Writ of Attachment and Execution ordering that upon expiration of a 20 day period after the dismissal of Serrano's Chapter 11 bankruptcy petition, any funds belonging to Serrano were to be delivered to a process server appointed by the Court by means of a check payable to the Clerk of this Court.

On July 10, 1990, in compliance with the Writ of Attachment and Execution, Mr. Rafael Villanueva, the designated process server, filed a motion tendering a check payable to the Clerk of this Court in the amount of **$557,862.65.**[3] On July 13, 1990, the FDIC filed its Motion for Disbursement of Attached Funds (Docket No. 497). And on August 10, 1990, this Court issued an Order Authorizing Withdrawal of Funds (Docket No. 498) in favor of the FDIC.

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2. On November 18, 1988, the FSLIC filed a motion for lift of the automatic stay in order to continue prosecution its cross-claims against Serrano in this case. On January 13, 1989 the U.S. Bankruptcy Court ordered the stay lifted permitting the FSLIC to continue pursuing its claims in this case against Serrano until entry of judgment.

3. An additional **$5,886.65** were deposited on February 1, 1991.

Appendix C

On August 15, 1990, Prudential filed an Urgent Motion for Intervention (Docket No. 499) alleging it had a preferential lien over the funds attached by the FDIC and requesting a period of 15 days in which to submit a brief in support of its claim over the funds. On August 15, 1990, before the funds were disbursed to the FDIC, the Court issued an Order (Docket No. 500) staying its previous Order Authorizing Withdrawal of Funds of August 10, 1990 until further order. On August 20, 1990, Banco Cooperativo filed a Request for Permission to Intervene in this case. (Docket No. 501).

Thereafter, the parties have set forth their respective positions concerning the attached funds in multiple motions and briefs (Docket Nos. 502 through 528).

II. PRUDENTIAL'S CLAIM OF PREFERENTIAL LIEN

In its intervention in this case Prudential claims to have a preferential lien over the funds attached by the FDIC. Prudential alleges that its claim over the funds derives from an action filed by Banco Cooperativo against Prudential in the Superior Court of Puerto Rico.[4] In that action Banco Cooperativo essentially alleged that on or about the year 1980, Serrano, who was then employed as director of Prudential's Institutional Trading Department, caused some $295,000 in Puerto Rico General Obligation Bonds to disappear from Banco Cooperativo's account at Prudential. Banco Cooperativo asserted that Prudential, as the employer of Serrano, was liable to Banco Cooperativo for such loss.

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4. *Banco Cooperativo de P.R. v. Bache Halsey Stuart et al. v. Miguel A. Serrano, et al.*, Civil No. 84-5941 (903), Superior Court of Puerto Rico, San Juan Part.

Appendix C

In April of 1985, Prudential filed a third party complaint against Serrano in the Superior Court case asking that Serrano be held liable for the amount of any judgment which may be entered against Prudential in the action brought by Banco Cooperativo. It is on the basis of the pending action of Banco Cooperativo against Prudential and on Prudential's also pending third party claim against Serrano in the Superior Court case, that Prudential claims to have a $400,000 contingent claim against Serrano.

The funds attached by the FDIC were part of the proceeds from the sale of 32,400 shares of Bayamón Federal Savings Bank stock which belonged to Serrano and which he maintained in an account with Prudential. The 32,400 Bayamon Federal shares were sold pursuant to an Order of the U.S. Bankruptcy Court in the Chapter 11 bankruptcy case of Serrano.

Prudential claims to have a preferential lien over the funds attached by the FDIC by virtue of a Customer Agreement executed by Serrano with Bache Halsey Shields Incorporated (Prudential's predecessor) in September of 1980. The Agreement contains language providing that Prudential shall have a general lien over any securities held by Prudential on behalf of the client (Serrano) for the discharge of the account holder's obligation to Prudential.

Prudential also asserts that pursuant to a choice of law provision in the Customer Agreement New York law controls in this case and that pursuant to section 151 of New York Debtor and Creditor Law, it has a lien and right of set off over the funds in question.[5]

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5. *See* Brief in Support of Prudential Bache Securities, Inc.'s Preferential Lien Over Funds Attached by Plaintiff at 12-19 (Docket No. 502) and Reply to FDIC's Opposition to Prudential Bache's Brief Preferential Lien Over the Funds (Docket No. 514).

Prudential advances, in the alternative, that it has a lien over the funds in question under Puerto Rico law pursuant to the contract of agency provisions of the P.R. Civil Code, 31 L.P.R.A. §§ 4421, *et. seq.* Prudential's Brief at 19, Docket No. 502.

The FDIC asserts that the Customer Agreement upon which Prudential claims a preferential lien over the funds does not operate to create a lien over the funds under Puerto Rico law.

The FDIC asserts that it is Puerto Rico and not New York law which must be applied in this case. FDIC contends that under Puerto Rico law the Customer Agreement does not create a preferential lien in favor of Prudential. The FDIC further asserts that even if New York law were to be applied, Prudential's claim over the funds in question would fail.

A. Choice of Law

The law chosen by the parties to govern their relationship will not be applied when:

. . . .

(2) . . .

(a) the chosen state has not substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest

> than the chosen state in the determination of the particular issue and which, under the rule of 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement, Conflict of Laws 2d, § 187.

There seems to be no dispute that the Customer Agreement, upon which Prudential relies for its contention that it is New York and not Puerto Rico law that should be applied, was executed in Puerto Rico, between a resident of Puerto Rico and a securities firm located in Puerto Rico, the customer's account was opened in Puerto Rico, the shares in question were purchased in Puerto Rico and were issued by a financial institution (Bayamon Federal Savings) located in Puerto Rico. Thus, it is Puerto Rico not New York, that has a substantial relationship to the parties, the transaction and the securities.

Additionally, to the extent that application of New York law would permit the creation of a general lien on unmatured and contingent obligations arising out of a document not recorded or executed before a notary, it would also violate fundamental policies of the laws of Puerto Rico.

Art. 1764 of the P.R. Civil Code provides: "[a] pledge shall not be effective against a third person, when evidence of its date is not shown by authentic documents." 31 L.P.R.A § 5023.

Since Prudential's alleged lien would be tantamount to a pledge in this jurisdiction, it is invalid and unenforceable against third parties, as it does not appear executed in an "authentic

document".[6] *Ramos Mimoso v. Superior Court*, 93 P.R.R. 538, 541 (1966); *Liechty v. Descartes Sauri*, 109 D.P.R. 496, 504 (1980); *In re Santos & Nieves, Inc.*, 814 F.2d 57 (lst Cir. 1987); *In the Matter of Supermercados San Juan, Inc.*, 575 F.2d 8 (lst Cir. 1978).

The Customer Agreement pursuant to which Prudential claims a preferential lien was not executed before a notary and is, therefore, not an authentic document. Not having complied with the above stated requirements, Prudential does not have a preferential lien over the funds attached in favor of the FDIC under the law of Puerto Rico.

B. New York Law

Even if New York law were to be applied Prudential does not have a perfected lien over the funds attached by the FDIC.

Prudential claims that the controlling statute in this case is N.Y. Debt. & Cred. Law, §151, which provides as follows in pertinent part:

> Every debtor shall have the right upon:
>
> (d) the issuance of any execution against any of the property of a creditor;
>
> (e) the issuance of a subpoena or order, in supplementary proceedings, against or with respect to any of the property of a creditor; or

---

6. A private agreement is not an authentic document. A document executed before a notary is an authentic document. *Ramos Mimoso v. Tribunal Superior*, 93, P.R.R. 538 (1966).

> (f) the issuance of a warrant, of attachment against any of the property of a creditor, to set off and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor, any amount owing from such debtor to such creditor, at or at any time after, the happening of any of the above mentioned events, and the aforesaid right of set off may be exercised by such debtor against such creditor. . .

Pursuant to the above statutory provision, Prudential alleges to have a preferential lien and right of set-off against the funds attached by the FDIC in this case.

Prudential asserts that the lien and right of set-off which it claims are based upon a contingent liability of Serrano to Prudential. (Prudential's Brief at 17, Docket No. 502). Contingent liabilities are not within the right of set-off contemplated by § 151 of N.Y. Debt. & Creditor Law. *Trojan Hardware Co., Inc. v. Bonacquisti Const. Corp,* 534 N.Y.S. 2d 789, 141 A.D. 2d 278 (1988).

Section 151 provides a right of set-off only against *indebtedness,* matured or unmatured. "'Indebtedness' refers to the condition of being in debt and debt is generally defined as a fixed and certain obligation." *Trojan Hardware Co., Inc.,* 534 N.Y.S. at 790, 141 A.D. 2d at 281; *Norwich Pharmacal Co. v. Barrett,* 205 A.D. 749, 752, 200 N.Y.S. 298 (1923). It does not include liabilities which are contingent in that it is uncertain as to whether anything will ever be demandable. So long as a contingent liability in tort is unlitigated, it is not yet an "indebtedness" within the meaning of a statute providing for set-off. *Trojan Hardware Co.;*

Appendix C

Yellowitz v. J.H. Marshall & Associates. Inc., 284 A. 2d 665, 667 (D.C. App. 1971).

Accordingly, § 151 of N.Y. Debt. & Creditor Law does not afford Prudential a right of set-off nor a statutory lien over the funds attached by the FDIC.

C. Agency Provisions of the P. R. Civil Code

Prudential also argues that it has a statutory lien over the funds attached by the FDIC pursuant to the contract of agency provisions of the P.R. Civil Code, 31 L.P.R.A. 4421, *et seq.*, in particular art. 1621, 31 L.P.R.A 4464. Prudential brief at 19-21, Docket No. 502.

Among the requirements to invoke the right to retain things in pledge pursuant to art. 1621 are the following: (1) retention of a thing; (2) the existence of a credit in favor of the holder and (3) connection between the credit and the thing retained in pledge. I-II Puig Brutau, Fundamentos de Derecho Civil at 545 (2nd ed. 1976).

As to the requirement of the existence of a credit, Puig Brutau states that the right of retention in pledge can only be invoked in connection with a credit which is due and payable ("vencido"). I-II Puig Brutau at 546. In this case, there was no credit due and payable by Serrano to Prudential as it is on the basis of an unmatured, contingent liability that Prudential claims to have a right to retain in pledge the stock (now its proceeds) in question.

In addition, Prudential's claim under art. 1621 fails because there is no connection between the credit (the unmatured contingent liability) and the thing retained in pledge (the Bayamón Federal shares). The contingent liability upon which Prudential bases its claim to the shares is premised upon Serrano's activities

as an employee of Prudential and not due to Serrano's relationship with Prudential as a customer.[7] The Customer Agreement pursuant to which Prudential claims its right to retention in pledge, states that the customer (Serrano) is not an employee of Prudential or of any of its predecessors, or of any Exchange or Member Firm of any Exchange.[8] It is apparent that there is no connection between the stock retained in pledge pursuant to the Customer Agreement and the alleged contingent liability of Serrano to Prudential, which arises in connection with Serrano's activities as an employee of Prudential, not as an account holder.

Nevertheless, even if the requirements to properly invoke the right to retain things in pledge pursuant to Article 1621 were present, such a pledge is invalid and unenforceable against third parties such as the FDIC in this case unless it appears executed in an authentic document pursuant to 31. L.P.R.A. 5023. *Ramos Mimoso v. Superior Court,* 93 P.R.R. at 541; *Liechty v. Descartes Sauri,* 109 D.P.R. at 504.

III. CLAIM OF BANCO COOPERATIVO

On August 20, 1990, Banco Cooperativo filed a Request for Permission to Intervene in these proceedings (Docket No. 501). Thereafter, Banco Cooperativo it submitted numerous motions claiming a "preference" over the funds attached by the FDIC. (Docket Nos. 508, 509, 512, 516, 519, 521, 523, 524, 527 and 528).

---

7. *See* complaint in Civil Case No. 84-5941, Superior Court of Puerto Rico, San Juan Part, attached as Exhibit A to Opposition of the FDIC, Docket Nos. 504 and 505.

8. *See* Customer Agreement ¶ 2, attached as Exhibit A to Prudential's Brief, Docket No. 502.

Appendix C

Banco Cooperativo claims that because its judgment against Serrano was issued prior to that of the FDIC - Banco Cooperativo apparently obtained a judgment against Serrano in September of 1987, whereas the FDIC obtained its judgment in October of 1989 - pursuant to arts. 1821-1825 of the P.R. Civil Code, 31 L.P.R.A. 5191-5195, it has a preference over the funds attached by the FDIC in the present case. Banco Cooperativo's Legal Basis for Claimed Preference, Docket No. 508.

Specifically, Banco relies on the provisions of Article 1824 ; which state in pertinent part:

> With regard to all other personal and real property of the debtor, preference shall be given to:
>
> . . . .
>
> (4) Indebtedness which without special privilege appear:
>
> (a) . . .
>
> (b) In a final judgment, should they have been the object of litigation.
>
> These credits shall have preference among themselves according to the priority of dates of the . . . judgments.

Art. 1824 of the P.R. Civil Code, 31 L.P.R.A. 5194.

Appendix C

The FDIC argues that the preferences and priorities set forth in arts. 1821-1825, are not applicable to the question at bar, because Banco Cooperativo did not perfect an attachment or otherwise obtain any rights over the Bayamón Federal shares or its proceeds. The FDIC asserts that based on the axiom *prior tempore portior jure* Banco Cooperativo's claim over the attached funds is without merit.

In *Oronoz & Co. v. Alvarez*, 23 P.R.R. 497, 500 (1916) the P.R. Supreme Court held that:

> [T]he mere priority in judgment [dates] gives the prior creditor no lien. An attachment or other similar step is necessary to give the judgment a priority and **as between judgment creditors the first to attach has the priority.** It is a race of diligence. The priority of payments to which sections 1822 *et seq.* of the Civil Code relate has no application to attachments. (emphasis added) (citations omitted)

In *P.R. Bedding Mfg. Corp. v. Herger*, 91 P.R.R. 503, 507 (1964) the Supreme Court of Puerto Rico stated, "[t]here is no question that among common creditors the first one who attaches has preference over the others. . ." It has also held that "[i]t should be remembered that, grounded on the axiom *prior tempore portior jure*, even among creditors, 'the first who attaches has a preference over the others . . .'" *Empresas Capote, Inc. v. Tribunal Superior*, 3 P.R. Supreme Court Official Translations 1067, 1078-79 (1975), citing *P.R. Bedding*, 91 P.R.R. 507.

In view of the foregoing, the claim of Banco Cooperativo over the funds attached by the FDIC in this case is without merit.

Appendix C

IV CONCLUSION

Based on the foregoing, the Brief in Support of Prudential Bache Securities, Inc.'s Preferential Lien over Funds Attached by Plaintiff (Docket No. 502) is hereby **DENIED.**

It is further ORDERED that the Legal Basis for Claimed Preference filed by Banco (Docket No. 508) is hereby **DENIED.**

Accordingly, the claims of Prudential and Banco Cooperativo over the funds attached by the FDIC are hereby **DISMISSED** and the attached monies presently deposited with the Clerk of the Court will be disbursed to the FDIC.

IT IS SO ORDERED.

San Juan, Puerto Rico this *6th* day of March, 1992.

s/ RAYMOND L. ACOSTA
United States District Judge

APPENDIX D — REQUEST FOR PERMISSION TO INTERVENE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CIVIL NO. 840758 (RLA)

FEDERAL SAVINGS AND LOAN INSURANCE CORP.,

Plaintiff,

v.

SHEARSON AMERICAN EXPRESS, et al,

Defendants.

REQUEST FOR PERMISSION TO INTERVENE

TO THE HONORABLE COURT:

Now comes Banco Cooperativo through the undersigned attorney and respectfully claims and prays:

1. On 1984 Banco Cooperativo started suit No. 84-5941 (803) in the local Superior Court of San Juan, Puerto Rico, and on September 15, 1987 a judgement was issued against Miguel Serrano Arreche. He filed a request for reconsideration, which was denied and, as no appeal was taken from said decision, the judgement became firm and final.

2. On January 23, 1987 a hearing had been held before Hon. Judge Jaime Pieras, Jr., in criminal case No. 84-381, in relation with a restitution order and the claims of FDIC (FSLIC),

Prudential-Bache, and Banco Cooperativo over 32,400 shares of Serrano which Bache was holding and had been ordered to deposit in Court under the Court's jurisdiction and until further determination. All the claims were discussed and Judge Pieras Jr., ruled that the shares were to stay under the custody of the Court for safekeeping, with the understanding that "nobody waives a claim here", (page 33 transcript), and that the Court "do(es) not want any attachment of those shares". (page 32 transcript).

3. As during the month of January 1987 this party requested from the Superior Court an order to secure the judgement it expected to get against Miguel Serrano, the attorney for the FDIC wrote us a threatening letter where he stated:

> "We understand that your client, Banco Cooperativo, may be considering violating the terms of Judge Pieras' order by seeking to attach some of Serrano's property. Please be advised that such an action may place Banco Cooperativo in contempt of the Court's order." (Exh 1)

4. Consistent with its threat, FSLIC filed a motion requesting that we be held in contempt of court, to which we replied:

> "The request of FSLIC is improvident and ignores the previous proceedings and pronouncements made by Judge Jaime Pieras, Jr., in the January, 23rd hearing, wherein the Judge stated "The stock is going to be kept in the vault of the court. . . . and nothing will be done with that stock unless there is a final judgement, . . . nobody waives a claim here.

We are doing it for safekeeping." (Exh 2)

The contempt charge was properly and adequately ignored by the Court.

5. On February 12, 1987 the attachment order was issued, and a $100,000.00 bond posted to cover any damages the attachment may cause. The order was filed in the Federal Court, on September 9, 1987, with a motion that stated that:

> "(s)aid attachment has not been executed out of commity from the insular court and Banco Cooperativo since this Honorable Court—Judge Pieras, Jr.,—decided that the stock would be kept by the court's clerk and that no attachment would ensue. As a matter of record and as evidence of the interest of Banco Cooperativo to attach either the shares or the proceeds if they are released by the court, copies of the attachment papers are hereby included with the request that they be made a part of the record." (Exh 3)

6. That motion was followed by another dated September 23 1987, submitting the order to the marshall, further showing "the renewed interest of Banco Cooperativo in attaching certain shares or the proceeds thereof of Miguel Serrano Arreche and deposited with the court clerk." (Exh 4)

7. Meanwhile, the Court (Judge Pieras Jr.) had issued two very interesting orders on April 11, 1987. One read, "The matter as to the rights of the parties to the proceeds of the shares is not here decided." The other, addressed precisely to FSLIC, said: *"The*

parties have understood and agreed that the matter of ownership and priority of creditors and victims as to the Bayamon Fed. S&L's shares are questions pertaining to findings of facts and conclusions of law to be entered *by this* Court." (emphasis ours)

8. We had to abide by the order of Judge Pieras, Jr., and in good faith relied in his caveat and complied with it, under the conviction that said order was going to be observed by all concerned. Much to our chagrin, we just found out such was not the case, as parties that were present through counsel in said hearing, have completely disregarded the same and attached the proceeds of said shares, without mentioning to this Court the standing order of Judge Jaime Pieras, Jr. We have also been informed that said party (FDIC) requested disbursement of said funds. Banco Cooperativo was not notified of said request even though FDIC is aware of the bank's claim against said monies.

9. Upon Serrano's filing for bankruptcy, Judge Pieras, Jr., referred the whole file with all the matters he had under advisement to that court. The Bankruptcy Court did not enter into any of those issues, and the petition of Serrano was dismissed on May 16, 1990. Hence, it follows that the status of the proceeds of the shares and the rights and priorities of the creditors are and should be matters pending before Judge Pieras, Jr., who has not yet ruled on them. It is equally obvious that the action of FSLIC in not informing this Honorable Judge of the background of which it was intensely aware to the extent of having requested sanctions for "violations" to said orders, is a guileful action and the least it merits is a rebuke.

10. From the above, it follows that before FSLIC could attach the proceeds of the shares;

a) it should have disclosed the whole factual and legal picture before this Court;

b) Judge Jaime Pieras Jr., must have been given an opportunity to decide the matters pending before him;

c) the prior lien claim of Bache-of which FDIC-FSLIC are fully aware- should have been disposed of

d) the prior attachment -prior judgement rights of Banco Cooperativo, of which they are also fully aware, should have been disposed of,

e) the least they should have done is notify this Court and these parties before attempting to abscond with the funds.

Therefore, it is respectfully requested that the attachment and disbursement ordered be held in aboyance and the matter of prior claims, pending in case No. 84-381 be referred to its proper forum (Judge Jaime Pieras, Jr.) or in the alternative, be taken into consideration by this court before ruling definitely on the matter.

I CERTIFY: That on this same date I have sent a true and exact copy of this document to Roberto Boneta, Esq., Muñoz Boneta Arbona Benitez Peral, Popular Center Building, Hato Rey, Puerto Rico; Salvador Antoneti, Fiddler González & Rodriguez, Chase Manhattan Bank Building, Hato Rey, Puerto Rico; José Correa Cintrón, Box 23314, University Station, San Juan, Puerto Rico, 00931-23314, Maximiliano Trujillo, Apartado Postal 9481, Bayamón, Puerto Rico 00619; Juan Luis Boscio, P.O. Box 708, Ponce, Puerto Rico 00732; McConnell, Valdés, Kelley, Sifre, Griggs & Ruiz-Suria, G.P.O. Box 4225, San Juan, Puerto Rico 00936.

Appendix D

In San Juan, Puerto Rico, Agust 20, 1990.

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APPENDIX E — RELEVANT STATUTES

ADDENDUM 5

Chapter 399. Classification of Credits

§ 5191. How credits classified

Credits shall be classified for their graduation and payment in the order and manner specified in this chapter. — Civil Code, 1930, § 1821.

§ 5192. Credits preferred — As to specified personal property of debtor

With regard to specified personal property of the debtor, the following are preferred:

1. Credits for the construction, repair, preservation, or for the amount of the sale of personal property which may be in the possession of the debtor to the extent of the value of the same.

2. Those secured by a pledge which may be in the possession of the creditor, with regard to the thing pledged and to the extent of its value.

3. Those guaranteed by a security of goods or securities constituted at a public or commercial establishment with regard to the security and for the value of the same.

4. Credits for trasportation, with regard to the goods transported, for the amount of said transportation, expenses and rates of carriage and preservation, until the time of the delivery and for a period of thirty days afterwards.

5. Expenses of boarding with regard to the personal property of the debtor remaining in inns.

6. Credits for seeds and expenses of cultivation and harvesting, advanced to the debtor, with regard to the fruits of the crops to which they were applied.

7. Credits for rents and leases for one year with regard to the personal property of the lessee existing on the estate leased and on the fruits thereof. If the personal property, with regard to which the preference is allowed, has been surreptitiously removed, the creditor may claim it from the person who has the same, within the term of thirty days counted from the time it was so removed. — Civil Code, 1930, § 1822.

Annotations

2. Purchase price. A vendor of personal property has no right to attach the said property upon claiming the preference referred to in this section after the purchaser has sold and given the possession of it to another person, even assuming that it had not been paid for in full. Benítez Flores v. Borinquen Trading Corp., 1924, 33 P.R.R. 481.

The mere levy of an attachment on personal property at the instance of the holder of a promissory note is not sufficient to place such property beyond the operation of this section under which preference in connection with certain personal property of the debtor is given to creditors for the purchase price of the property, and less so in a case in which the property was sold under a public instrument while the promissory note was not made with that formality. González v. Alonso, 1924, 33 P.R.R. 66.

Appendix E

§ 5193. — As to certain real property and rights on realty

With regard to certain real property and rights on realty of the debtor, the following shall have preference:

1. Credits in favor of the Commonwealth of Puerto Rico or of the corresponding municipality with regard to the property of the taxpayers for the amounts of the last three annual assessments and the current annual assessment, unpaid, of the taxes which burden the same.

2. Credits for advances for agricultural purposes, as to the crops on the property for which such advances are made, as provided in the special act relative to that subject.

3. Credits of insurers, with regard to the property insured, for the insurance premiums for two years, and should the insurance be mutual, for the last two dividends declared.

4. Mortgage and agricultural credits (*refaccionarios*) entered and recorded in the registry of property, with regard to the property mortgaged, for which had been the object of the agricultural loan (*refacción*).

5. Credits, of which a cautionary notice has been made in the registry of property by virtue of a judicial mandate, by reason of attachments, sequestrations, or execution of judgments, with regard to the property entered therein and only with regard to subsequent credits.

6. Agricultural loans not entered or recorded with regard to the real estate to which the agricultural loan (*refacción*) relates, and only with regard to other credits from that mentioned in the

four preceding numbers. — Civil Code, 1930, § 1823; Const., art. IX, § 4, eff. July 25, 1952.

§ 5194. — As to all other personal and real property

With regard to all other personal and real property of the debtor, preference shall be given to:

1. Credits in favor of the Commonwealth of Puerto Rico and of the corresponding municipality for the taxes of the last three annual assessments due and the current unpaid annual assessment which are not covered by paragraph one of the preceding section.

2. Credits for advances for agricultural purposes, as to the crops on the property for which such advances are made, as provided in the special act relative to that subject.

3. Those due:

(*a*) For judicial expenses and those of administration of bankruptcy for the common interest of the creditors, made with the proper authorization or approval.

(*b*) For the funeral expenses of the debtor, according to the customs of the place, and also those of his wife and of his children, under their parental authority, should they have no property of their own.

(*c*) For expenses of the last illness of said persons, incurred during the last year, counted up to the day of their death.

(*d*) For daily wages and salaries of employees and domestic servants for the last year.

(*e*) For advances made to the debtor for himself and his family constituted under his authority, in provisions, clothing, or shoes, for the same period of time.

(*f*) For income for support during proceedings in bankruptcy, unless they are based on mere beneficence.

4. Indebtedness which without a special privilege appear:

(*a*) In a public instrument.

(*b*) In a final judgment, should they have been the object of litigation.

These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments. — Civil Code 1930, § 1824; Const., art. IX, § 4, eff. July 25, 1952.

§ 5195. Credits having no preference

Credits of any other kind or for any other consideration not included in the preceding sections, shall have no preference. — Civil Code, 1930, § 1825.

FILED
JAN 26 1994
CLERK

No. 93-822

In the Supreme Court of the United States

OCTOBER TERM, 1993

BANCO COOPERATIVO DE PUERTO RICO, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under Puerto Rico law, the FDIC, as the first judgment creditor to attach assets, gains priority over the petitioner, where the petitioner claims an interest in the assets but failed to attach.

2. Whether this Court should review petitioner's claim that the FDIC acted in bad faith in attaching the assets where petitioner's claim is both untimely and unsupported by the record.

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FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-25a) is reported at 996 F.2d 493. The opinion of the district court (Pet. App. 28a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on June 24, 1993. A petition for rehearing and suggestion for rehearing en banc was denied on August 27, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on November 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, former stockbroker Miguel Serrano Arreche (Serrano) was convicted in the United States

District Court for the District of Puerto Rico of wire and mail fraud, as well as violations of other federal criminal statutes, in connection with his dealings with Citibank and Home Federal Savings and Loan Association of Puerto Rico (Home Federal). Pet. App. 5a. Serrano was the "mastermind of a multimillion dollar fraud" (*ibid.*) that particularly damaged Home Federal, a Puerto Rico thrift. Home Federal was declared insolvent and placed in receivership with the Federal Savings and Loan Insurance Corporation (FSLIC) in 1984.

The district court determined Home Federal to be a victim of embezzlement by Serrano, and ordered restitution to the FSLIC, as Home Federal's successor, in the amount of almost $3 million. Resp. C.A. Br. 5. The district court appointed a trustee for Serrano's property and enjoined all persons from prosecuting any action that might affect his property. His only significant assets were 32,400 shares of Bayamón Federal Savings Bank stock. Pet. App. 6a.

The FSLIC also replaced Home Federal in this civil case, which was ongoing in the United States District Court for the District of Puerto Rico at the time of Serrano's conviction. This action was initiated in 1984 by the Municipality of Ponce against various defendants, including Home Federal, Shearson Lehman Brothers, Inc. (Shearson), and Serrano. Home Federal had cross-claimed against Serrano and Shearson, among others. Pet. App. 5a-6a. On December 10, 1985, the FSLIC filed amended cross-claims against those parties. The FSLIC ultimately settled its claims with Shearson in November of 1988, but continued to pursue its claims against Serrano. *Id.* at 29a.

In September, 1987, Serrano filed a Chapter 11 bankruptcy petition, which triggered the automatic stay provision, 11 U.S.C. 362. Pet. App. 30a. Upon the filing of Serrano's petition, the stock held in trusteeship in the criminal action was transferred to the bankruptcy court. Resp. C.A. Br. 8-9; Pet. App. 6a & n.2. On January 13, 1989, pursuant to a motion by the FSLIC, the bankruptcy court lifted the automatic stay, which permitted the FSLIC to pursue its claims in the instant litigation against Serrano. Pet. App. 30a. In April, 1989, the bankruptcy court ordered Serrano's stock sold and the proceeds deposited with the bankruptcy court as property of the estate. *Id.* at 6a-7a.

In the current action, the district court entered a default judgment on October 16, 1989, in favor of the Federal Deposit Insurance Corporation (FDIC), successor to the FSLIC,[1] in the amount of $44,265,241 on its cross-claim against Serrano. Pet. App. 6a. On May 16, 1990, the bankruptcy court, acting on a prior FSLIC motion, dismissed Serrano's bankruptcy petition; on that same day, the FDIC moved for attachment and execution in the district court for satisfaction of its judgment against Serrano. *Id.* at 30a. On May 17, 1990, the district court issued the writ of attachment, and on July 10, 1990, the proceeds from the sale of Serrano's stock (approximately $560,000) were tendered to the district court clerk. *Id.* at 8a, 30a. On July 13, 1990, the FDIC moved for

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[1] The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, §§ 401-402, 103 Stat. 183, abolished the FSLIC and made the FDIC the FSLIC's successor in interest.

disbursement of the attached funds; the district court granted the FDIC's motion on August 10, 1990. *Ibid.*

2. On August 20, 1990, petitioner Banco Cooperativo de Puerto Rico, which had never been a party to the present action, intervened and submitted numerous motions asserting a "preference" under Puerto Rico law to the funds attached by the FDIC. Pet. App. 38a-39a. Petitioner claimed to have sued Prudential Bache Securities, Inc. (Prudential), in Puerto Rico state court in 1984 for embezzlement committed by Serrano while he was employed by Prudential in 1980. Petitioner claimed that it ultimately obtained a judgment against Serrano in September 1987 for $295,000. *Id.* at 9a.[2] As the court of appeals noted, however, petitioner "never executed the judgment, attached the funds that are the subject of this [case], or otherwise obtained a lien on any of Serrano's property." *Id.* at 20a. Even though the FDIC had already attached Serrano's property and petitioner had failed to do so, petitioner claimed a statutory preference to the proceeds of the stock sale. *Id.* at 39a. Petitioner maintained that Puerto Rico Civil Code §§ 1821-1825, P.R. Laws Ann. tit. 31, §§ 5191-5195 (1990), grant preference to judgments prior in time, notwithstanding any prior attachment of the property subject to the judgment.[3] Pet. App. 39a-40a.

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[2] Petitioner had attempted, in 1987, to attach Serrano's stock, then held in trusteeship in the criminal action, but was barred by the district court's injunction. Resp. C.A. Br. 8.

[3] Title 31, P.R. Laws Ann. § 5191 (1990), provides that "[c]redits shall be classified for their graduation and payment in the order and manner specified in this chapter." Title 31, P.R. Laws Ann. § 5194 (1990) provides in part:

The district court stayed disbursement pending its ruling on petitioner's motion.[4]

3. On March 6, 1992, the district court rejected petitioner's claim. Pet. App. 41a. The district court relied on *Oronoz & Co.* v. *Alvarez*, 23 P.R.R. 497 (1916), in which the Puerto Rico Supreme Court declared that, between judgment creditors, the first to attach has priority, and that this rule is unaffected by the Puerto Rico Civil Code. *Id.* at 500. The district court also followed *Puerto Rico Bedding Mfg. Corp.* v. *Herger*, 91 P.R.R. 503, 507 (1964), in which the Puerto Rico Supreme Court again acknowledged that the first creditor to attach has preference. Accordingly, the district court ruled that petitioner's claimed preference lacked merit under Puerto Rico law. Pet. App. 38a-41a.

The court of appeals affirmed. Pet. App. 3a-25a. The court agreed with the district court that the

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With regard to all other personal and real property of the debtor, preference shall be given to:

* * * * *

(4) Indebtedness which without a special privilege appear:

(a) In a public instrument.

(b) In a final judgment, should [it] have been the object of litigation.

These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments.

[4] Prudential filed a similar motion to intervene claiming a lien over the attached funds. Prudential's claim was dismissed by the district court; the court of appeals affirmed. See Pet. App. 16a-19a.

statute upon which petitioner relied, P.R. Laws Ann. tit. 31, § 5194 (1990), did not apply. The court noted that under petitioner's hypothesis, Section 5194 would render ineffective the FDIC's attachment. The court observed that "[t]he Supreme Court of Puerto Rico has consistently held * * * that [P.R. Laws Ann. tit. 31, § 5194 (1990)] does not supplant the standard rule that, as between two judgment creditors without other liens, the first creditor to attach has priority." Pet. App. 22a (citing *Oronoz*, 23 P.R.R. at 500, and *Puerto Rico Bedding*, 91 P.R.R. at 507). The court concluded that Section 5194(4) creates no statutory lien on property of the debtor and that a general judgment creditor must execute its judgment by attachment before claiming a priority. Accordingly, the court ruled that the FDIC's lien has priority over petitioner's unexecuted judgment. Pet. App. 23a-24a.[5]

ARGUMENT

Petitioner contends (Pet. 5-23) that the court of appeals erred in concluding that the first judgment creditor to attach a debtor's property gains priority under Puerto Rico law, and also erred when it found no evidence that the FDIC acted in bad faith by attaching the assets first. Neither contention merits this Court's review.

1. Petitioner errs in asserting (Pet. 11-23) that its unexecuted 1987 judgment has a statutory preference

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[5] The court declined petitioner's invitation to find *Oronoz* wrongly decided or mistranslated, since it lacked the authority to do so. Pet. App. 24a & n.13. The court of appeals also rejected as untimely petitioner's claim that the FDIC acted in bad faith in attaching the funds. The court noted that in any event it found no evidence in the record to support petitioner's allegations of bad faith on the FDIC's part. *Id.* at 24a n.14.

under Puerto Rico law, P.R. Laws Ann. tit. 31, § 5194 (1990), over the FDIC's 1989 judgment, which petitioner concedes (Pet. 23) was executed by attachment. In *Oronoz & Co.* v. *Alvarez*, 23 P.R.R. 497 (1916), the Supreme Court of Puerto Rico expressly rejected this argument:

> We have recently decided that mere priority in judgment gives the prior creditor no lien. *Auffant* v. *Succession of Manuel de J. Ramos et al.*, [23 P.R.R. 385 (1916)]. An attachment or other similar step is necessary to give the judgment a priority and *as between judgment creditors the first to attach has the priority*. It is a race of diligence. The priority of payments to which sections 1822 *et seq.* of the Civil Code[, P.R. Laws Ann. tit. 31, §§ 5191 *et seq.* (1990),] relate has no application to attachments.

Id. at 500 (emphasis added).[6] The Puerto Rico Supreme Court has consistently affirmed the *Oronoz* "first-to-attach" rule, as the courts below correctly noted. Pet. App. 22a, 40a; see *Puerto Rico Bedding Mfg. Corp.* v. *Herger*, 91 P.R.R. 503, 507 (1964) ("among common creditors the first one who attaches has preference over the others"); *Empresas Capote, Inc.* v. *Superior Court*, 3 P.R. Sup. Ct. Off'l Translations

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[6] Acknowledging that *Oronoz* is fatal to its claim, petitioner styles the case "an incorrect expression of the law," and postulates that the Puerto Rico Supreme Court meant its rule to apply only to "common," not "judgment," creditors. Pet. 15. On this point, the court of appeals correctly found, "we do not have the authority to declare *Oronoz & Co.* to be wrongly decided by the Puerto Rico Supreme Court or mistranslated by the official court translator, as [petitioner] urges us to do." Pet. App. 24a n.13.

1067, 1078-1079 (1975) ("It should be remembered that, grounded on the axiom *prior tempore portior jure*, even among common creditors, '* * * the first one who attaches has preferences over the others.'").[7] Under *Oronoz* the FDIC, as the first judgment creditor to attach, gained priority. As the court of appeals correctly determined, Section 5194 does not alter that result.[8]

2. Petitioner invokes the exercise of this Court's power of supervision over the FDIC's alleged bad faith concerning its attachment of the debtor's property. Pet. 5-10. Petitioner's principal complaint is that the FDIC twice "imped[ed] [petitioner] from executing a valid attachment order"; however, petitioner concedes that in each instance attachment was "barred by law." Pet. 7. Similarly, petitioner decries the FDIC's "squeeze[d-]in" attachment (*ibid.*), despite the fact that Puerto Rico law establishes a "race of diligence" between judgment creditors and encourages each to attach first. See *Oronoz*, 23 P.R.R. at 500. In this case, the FDIC simply won the

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[7] The First Circuit has also consistently recognized *Oronoz*'s "first-to-attach" rule. See *In re J.R. Nieves & Co.*, 446 F.2d 188, 193 (1st Cir. 1971); *Yumet & Co.* v. *Delgado*, 243 F. 519, 522 (1st Cir. 1917).

[8] As the court of appeals also correctly observed, certain Puerto Rico code provisions grant statutory preferences that act as the equivalent of statutory liens, but Section 5194 is not one of them. Cf. P.R. Laws Ann. tit. 31, § 5192(1) (1990) (essentially creating a seller's lien on personal property); *id.* § 5192(4) (lien for costs of transportation); *id.* § 5192(6) (lien on fruit crops in favor of creditor who provided seed). Since Section 5194 creates no such lien, a general judgment creditor must execute its judgment by attaching property, which petitioner failed to do in this case. Pet. App. 23a-24a.

race. Concerning petitioner's untimely bad faith allegation,[9] the court of appeals correctly determined that there was "no evidence in the record to support [petitioner's] allegations of bad faith on the FDIC's part." Pet. App. 25a n.14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1994

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[9] Petitioner's allegation of bad faith was first raised in a motion to reconsider the district court's opinion. The court of appeals consequently declined to consider it. Pet. App. 24a n.14.

(3)

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No. 93-822

In The

Supreme Court of the United States

October Term, 1993

BANCO COOPERATIVO DE PUERTO RICO,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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REPLY BRIEF

Respondent claims in its Reply Brief that our "principal complaint is that the FDIC twice 'imped[ed] [petitioner] from executing a valid attachment order'; however, [we] concede that in each instance attachment was 'barred by law.' " Said statement is incorrect due to their quoting out of context from our Petition. In said petition we stated:

> "The fact remains that they impeded Banco from executing a valid attachment order, with the aid of the Court, without any legal basis for their actions, in what could be termed an abuse of legal proceedings." Pet. 7.

How a claim that they impeded us "from executing a valid attachment order . . . without any legal basis

. . . abus[ing] of legal proceedings . . . with the aid of the Court," be equated to an admission that their action is legal, or our action was "barred by law", is beyond our comprehension.[1]

Our contention is, and always has been, to the effect that Banco Cooperativo had a prior judgment to FDIC's, and as early as 1987 attempted to execute an attachment. The FDIC (which did not get his judgment until three years three months after Banco got his) and a Federal District Judge from our Federal District Court, acting under the urging of FDIC, prevented Banco from attaching, threatened us with contempt proceedings, with the Judge **assuring us that Banco's rights would be preserved by the Court**, and that we were not waiving anything by the Court taking possession of the property Banco tried to attach. The property (shares) were to be taken under the custody of the Court – the Judge stated – just "for safekeeping". **SOME SAFEKEEPING!!**

The Court stated, and Banco believed in the truth of the statement; **that Banco's rights would be preserved by the Court**, that we were **not waiving anything** by not making the attachment, that the shares were taken under the custody of the Court just "for safekeeping". Yet, several years later that same Court gave the property to FDIC, the Circuit Court went along, and the only reason given is: **because they attached first.**

FDIC sidesteps the moral and ethical issue with the simplistic pronouncement that "Puerto Rico law

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[1] Our "barred by law" statement refers to the fact that during the bankruptcy proceedings our attachment could not be perfected as it was barred by the Bankruptcy law.

establishes a 'race of diligence' between judgment creditors[2] and encourages each to attach first. **IN THIS CASE, THE FDIC SIMPLY WON THE RACE.**" Apparently, it is FDIC's contention that how you win the race does not matter. Allow us two observations on said assertion.

First, it is not a race as to who attaches first. In any case, it is as to – if both are common creditors – who gets a judgment first. FDIC makes the same mistake of the lower courts of ignoring the difference between "common" and "preferred" creditors, which our statute clearly makes. They also ignore the limitation of the **Oronoz** decision made by our Supreme Court in the case of *Heirs of Garriga v. O'Meara*, (1920), 28 P.R.R. 332, where our Supreme Court explains the *Oronoz* case, excluding any mention of judgments, thus:

> "The case of *Oronoz & Co. v. Alvarez*, 23 P.R.R. 497, is not applicable. There the question was regarding the preference of rights derived from certain attachments levied, while the present case refers to the preference of claims by virtue of certain statutory rights."

We must also mention the case of *Wholesalers Chamber of Commerce* v. *Superior Court, Sucesores de Esmoris & Co.*, 2 P.R. Sup. Ct. Off. Trans., 838, (1974) where the court said [footnote #3] that "it will be the judgment, and not the attachment, what gives preference to the credit. Article 1824 of the Civil Code, infra." In 1974, despite other interpretations Art. 1824 is still alive. And, in the same footnote our Court added:

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[2] What happened to: judgment credits "shall have preference among themselves according to the priority of dates of . . . the judgments". Article 1824 (4) **in fine?**

> "For that reason the statement of motives of the Mortgage Law of 1861 stated that cautionary notices 'do not declare any right or even less turn into real the one which did not have that nature,' as neither 'can it be said that they are the prize of the race,' as it has been said in another nation, assimilating the persistence of creditors to anticipate to obtain the entry, to the anxiety which the arrival in horse races is disputed . . . nor they make the judge agent of the litigants . . . "

Said reasoning, applicable to entries or annotations in our Property Registry, is also applicable to situations like the one confronted in the **Heirs of Garriga** case, where the preference is claimed "based on certain statutory rights". Such is the case when Article 1824 is invoked. In other words, if the situation concerns "common creditors" as defined by our Code, let the creditors run to attach first, but if a creditor has an Article 1822, 1823 or 1824 preference, i.e. not a common creditor, the race is not for him.

The second point we candidly must mention to This Honorable Court has to do with: if there is to be a race, what can you do and not do to win it. Can you order somebody to break the leg of your closest competitor, to win the race and get the prize?[3] Can you get a court to forbid somebody to do something he/she has a right to do, and later claim priority because you did and he did not do what you/the court prevented him from doing?

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[3] The ex-husband of skater Tonya Harding hired somebody to break a leg of Olympian Nancy Kerrigan. Miss Kerrigan could not compete and Tonya "won" the competition. Now all implicated are facing criminal charges and Tonya faces disqualification from the U.S. Olympic team. Justice is being done.

The most pathetic factor in this case is that a Federal District Judge was used – we are sure unwittingly, but very effectively – with the full imprimatur of his high office. If a citizen cannot accept, credit or trust assurances he/she receives from a Federal District Court, maybe our national motto "IN GOD WE TRUST" should be amended to read "WE SHOULD ONLY TRUST GOD".

The second most pathetic factor is that the instigator of the injustice committed in this case is a Federal Government Agency, represented before this High Court by an impressive list of attorneys from none other than the U.S. DEPARTMENT OF JUSTICE.

The bottom line, if FDIC's attachment is allowed preference over the interest of Banco, is that Banco had a right to its attachment in 1987, but got mugged en route to its destination, of all places, in the web of the judicial system in a Federal Courtroom.

CONCLUSION: A writ of Certiorari should be issued and Banco's judgment granted priority, or the case be remanded to our District Court for an evidentiary hearing, should conclusions of facts be deemed necessary.

Respectfully submitted,

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